AMENDING THE REGULATORY FLEXIBILITY ACT—PAST PERFORMANCE AND THE NEED FOR MEANINGFUL REFORM

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

WASHINGTON, DC, FEBRUARY 10, 1995

Printed for the use of the Committee on Small Business

Serial No. 104–10

U.S. GOVERNMENT PRINTING OFFICE

88–321 CC WASHINGTON : 1995

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-047212-1

AMENDING THE REGULATORY FLEXIBILITY ACT—PAST PERFORMANCE AND THE NEED FOR MEANINGFUL REFORM

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

WASHINGTON, DC, FEBRUARY 10, 1995

Printed for the use of the Committee on Small Business

Serial No. 104–10

U.S. GOVERNMENT PRINTING OFFICE

88–321 CC WASHINGTON : 1995

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-047212-1

COMMITTEE ON SMALL BUSINESS

JAN MEYERS, Kansas, *Chair*

JOEL HEFLEY, Colorado
WILLIAM H. ZELIFF, JR., New Hampshire
JAMES M. TALENT, Missouri
DONALD A. MANZULLO, Illinois
PETER G. TORKILDSEN, Massachusetts
ROSCOE G. BARTLETT, Maryland
LINDA SMITH, Washington
FRANK A. LoBIONDO, New Jersey
ZACH WAMP, Tennessee
SUE W. KELLY, New York
DICK CHRYSLER, Michigan
JAMES B. LONGLEY, JR., Maine
WALTER B. JONES, JR., North Carolina
MATT SALMON, Arizona
VAN HILLEARY, Tennessee
MARK E. SOUDER, Indiana
SAM BROWNBACK, Kansas
STEVEN J. CHABOT, Ohio
SUE MYRICK, North Carolina
DAVID FUNDERBURK, North Carolina
JACK METCALF, Washington

JOHN J. LaFALCE, New York
RON WYDEN, Oregon
NORMAN SISISKY, Virginia
KWEISI MFUME, Maryland
FLOYD H. FLAKE, New York
GLENN POSHARD, Illinois
EVA M. CLAYTON, North Carolina
MARTIN T. MEEHAN, Massachusetts
NYDIA M. VELÁZQUEZ, New York
CLEO FIELDS, Louisiana
WALTER R. TUCKER III, California
EARL F. HILLIARD, Alabama
DOUGLAS "PETE" PETERSON, Florida
BENNIE G. THOMPSON, Mississippi
CHAKA FATTAH, Pennsylvania
KEN BENTSEN, Texas
KAREN McCARTHY, Missouri
WILLIAM P. LUTHER, Minnesota
PATRICK J. KENNEDY, Rhode Island

JENIFER LOON, *Staff Director*
JEANNE M. ROSLANOWICK, *Minority Staff Director*

CONTENTS

AMENDING THE REGULATORY FLEXIBILITY ACT—PAST PERFORMANCE AND THE NEED FOR MEANINGFUL REFORM

FRIDAY, FEBRUARY 10, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The committee met, pursuant to notice, at 10:10 a.m., in room 2359–A, Rayburn House Office Building, Hon. Jan Meyers (chairwoman of the committee) presiding.

Chairwoman MEYERS. Good morning. Today's hearing is the second hearing we are having concerning the Regulatory Flexibility Act. While our hearing last month focused primarily on current legislation designed to strengthen the act, and we heard from a number of small business groups who strongly favor regulatory flexibility, this morning's hearing is designed more to provide the committee with some needed historical perspective on how the RFA has worked or not worked in practice.

From our review of the annual reports of the Office of Advocacy concerning implementation of the act, it is all too apparent that some agencies have consistently observed the letter and spirit of the RFA, while others have completely ignored it. There are also agencies which have shown improvement in their understanding of and compliance with the Regulatory Flexibility Act, and for that they should be commended.

We are here today to hear from representatives of agencies with varying degrees of compliance so that we can get a better idea of how we should approach current proposals to amend the RFA.

I think with that, I will proceed to hear from our witnesses today. Our first panel is Mr. Jere Glover, who is the Chief Counsel for Advocacy of the U.S. Small Business Administration, and Mr. Frank Swain of Baker & Daniels, Washington, DC.

Mr. Swain, I think you were also Chief Counsel for Advocacy in the Reagan Administration; is that not right?

Mr. SWAIN. That is correct.

Chairwoman MEYERS. All right. So, we have two Chief Counsels for Advocacy, a former and a current, and we look forward to hearing from you.

[Chairwoman Meyers' statement may be found in the appendix.]

TESTIMONY OF JERE GLOVER, CHIEF COUNSEL FOR ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION, WASHINGTON, DC

Mr. GLOVER. Good morning, Madam Chairman, members of the committee. I am privileged to be here today to talk about the Regulatory Flexibility Act. The first thing I would like to do is compliment Congressman Skelton and Congressman Ewing for their foresight in recognizing the need to improve the compliance of the Regulatory Flexibility Act in introducing their legislation last year.

I also have with me today Barry Pineles who has been in charge of regulatory affairs for the Office of Advocacy during the past eight Chief Counsels. That happens to have been 8 years, but served under Frank Swain as well as several other people in-between myself.

The interesting thing about the Office of Advocacy, which many people don't necessarily recognize, is Congress in its wisdom decided that the Office of Advocacy must be filled by someone from the private sector, bringing that private sector experience to the office of Chief Counsel. I myself bring a history of running successful businesses and a wealth of experience in filling out Government forms and complying with Government regulations. It is in that context that I bring that background to the testimony.

Clearly, the Office of Advocacy has a variety of functions, not only to represent the views of small business before Congress and the Government agencies, but to also do the—file annual reports, and through the years that has been something that has been an historical record, and one can look at that record and find that unfortunately, the same agencies appear to—appear in those annual reports year after year as not choosing to comply.

What we do see is a pattern of agencies who over time do evolve and do realize that they need to comply. The Office of Advocacy has primarily been given the authority to interact with agencies who don't comply to try to bring them into compliance.

Now, there have been a number of things that have happened since I became Chief Counsel 7 or 8 months ago that I think point to a better relationship with the agencies. Clearly, having the Administrator of SBA at NEC made sure that when the decision of whether the administration was going to support judicial review for Reg Flex was made, that small business had that voice with the President and that decision was made by the President to support judicial review.

Perhaps had we not had Erskine Bowles on the NEC and had he not been working with the Office of Advocacy to understand the problems, we might not have won that battle with the administration, but that is a step forward. Since Phil Lader has become the Administrator, on several instances I pointed out to him where we have had trouble in compliance with agencies, and he has gone to the head of the agencies and discussed that with them, facilitated some meetings that would not have happened, and as a result of that, we have had assurances of future compliance from agencies that really had not focused on that before.

So, I think clearly those two things are important. The other thing that we have done is we have prepared amicus briefs, we did file a notice of intention to file with the court. That authority was

important to us; it allowed us to make our views heard and, quite frankly, it allowed us to have the agency change what it was doing so that small business in effect, did prevail, because the agencies modified what they were going to be doing in their regulations to come into compliance with the Regulatory Flexibility Act and to reduce the burden on small business.

So, clearly, things are better, and I will tell you that we have also entered into a Memorandum of Understanding with the Office of Information and Regulatory Affairs at the White House. OIRA has been very cooperative, and since we have entered into that agreement, they have sent back regulations to be redone because when agencies contacted us and certified the regulations as not affecting small business; when in fact, they do affect small business, we go back to them at a preliminary stage before publication and we tell them that it would affect a small business.

OIRA then sends it back as part of the OMB clearance process to the agencies and direct the agencies to do an initial Reg Flex analysis, and so they have been able to use that new agreement authority very successfully. We expect to continue using that agreement.

While I am here to say that there have been dramatic and significant improvements, I am also here to tell you that as Chief Counsel, the judicial review is very important to the ongoing relationships. I think if you look at the history of compliance, what you see is where the agency makes an early decision as to what it wants to do with the regulation, we then run into problems.

When they go into the process, like EPA often does, looking at the impacts early on, doing the initial research to do the analysis, so when they do the first proposal, they have already looked at the impacts on small business. Those regulations seem to come out well. It is when the agency goes in, and sometimes the agencies going in because Congress told them to do a specific thing in the regulations, and what we hear from the agencies is we don't have any flexibility; We are forced by Congress to do this specific thing this way.

Clearly, Congress has been part of the problem. But again, the agencies often on their own, and most times on their own, look at a specific problem, make up their mind what they want to do and then go back and do a post hoc determination.

If they do a Reg Flex analysis at all, they are usually certified under those circumstances, but if they do one, they do a very cursory, perfunctory one. So, judicial review is the only way I know that we can address this problem.

Clearly, this administration is committed to small business and committed to the Regulatory Flexibility Act and strong enforcement of it, but—and I can tell you as Chief Counsel, I am certainly strongly committed to that. But from time to time people change, and given the pattern of the last 8 years when we have had a number of different Chief Counsels, I won't always be here, the President always won't be there with his commitment; we won't have strong administrators who fight for small business and we won't have a head like Sally Katzen who will help us take up the battle, and quite frankly, no matter what any of us say, there are agencies who simply choose to ignore the Regulatory Flexibility Act.

So, I am basically here to say that I think the Regulatory Flexibility Act will cure the problem. If we have judicial review, it will cure the problem. We can go forward and what I would encourage you to do is pass an independent Regulatory Flexibility Act with strong judicial review quickly so that we can bring the recalcitrant agencies into compliance.

Thank you very much.

Chairwoman MEYERS. Thank you very much, Mr. Glover.

[Mr. Glover's statement may be found in the appendix.]

Chairwoman MEYERS. Mr. Swain.

TESTIMONY OF FRANK S. SWAIN, BAKER & DANIELS, WASHINGTON, DC

Mr. SWAIN. Madam Chair, thank you very much. It is a real pleasure to be here. I think I might have appeared in front of this committee maybe 25 times during the 1980's, although I must say it is refreshing to see the alignment on the dais when I was the Republican counsel on a democratically controlled House. Nevertheless, I hope that I was able to enjoy a positive relationship with the committee for the most part, because the cause of small business is probably the most nonpartisan or bipartisan cause that we pursue in Government.

I congratulate the committee also for taking time on this issue. This is dry, dusty, inside-the-beltway stuff. How rules are made and who talks to who when and when analyses are issued is not anything that business people in the real world get terribly excited about until, of course, at the end of the line, a wrong decision is made and some inspector shows up at the door enforcing some absolutely stupid or unnecessary rule.

It was in order to attempt to get a grip on that that the Congress considered in 1979 and eventually passed in 1980 the Regulatory Flexibility Act. The interesting thing as I was thinking back on it at the time, I was a lobbyist for the NFIB and we had a fight with OSHA or maybe fight to a draw or maybe not, and we would go fuss with EPA, and there was a series of going to various agencies and the issues were always the same: We have got to keep the air clean, we have to keep the air clean and regulate both big business and small business.

We said well, but small business isn't causing as much of the problem; why do you have to be as tough on them? Well, the law says we do. But the fact of the matter is that the law usually didn't say that they did. Many agencies didn't believe that they had the legal authority to write a rule that was different for smaller business than big business. Even though it made absolute common sense, and even though there was nothing in many of these laws that stopped them from doing that.

So, what most people paid attention to I believe in thinking back on it in 1979 and 1980 was to write a law that said that every Federal agency, you have the authority to write different rules for smaller business and for smaller entities, small cities and nonprofit entities and so on, for smaller entities than you do for big business.

Not because we want to compromise safety or health or protection of the environment or any of the other proper reasons for regulation, but because you have to take into account the fact that

these smaller players don't cause as much of the problem, and you also have to take into account the fact that these smaller players can't respond as quickly and can't raise a lot of money to put together the solutions that are maybe necessitated by your regulation.

At the time the question came up sort of at the end of the debate, well, what about enforcement? What if they don't do it? And at that point, the people who were working on the legislation really didn't want to set up another situation like NEPA. You will recall that the Environmental Policy Act at the time, especially in the late 1970's, was being used to stop proposals right and left, to take so-called interlocutory appeals. Before a rule ever became final, you would be able to challenge it on environmental grounds.

So, there was a concern that the agency be able to work through problems without being challenged right and left. But I think the Congress and history tells us that Congress really flinched too early, and in fact, they really didn't provide any enforcement scheme at all. As I said in my statement, what they did was they told the Office of Advocacy to be a monitor of regulations.

As Jere Glover pointed out, what that means is that the Office of Advocacy can take a look at what the agencies are doing, they can go and they can meet with the agencies; they can yell at them, they can comment on the record, and even in some limited ways, they may be able to go and reflect their comments in court.

But necessity cannot order an agency to do anything different, nor more importantly can anybody else, except the President obviously. So, the points that Mr. Glover made about working closely with the OIRA office are very important, because in the end, the President is the person that backs up the Chief Counsel for Advocacy.

Nobody in small business can back them up because they don't have the legal ability to do so. The most they can do is issue a press release and try to embarrass people into doing something differently.

Well, the fact of the matter is there are hundreds of different regulations each year. So, it is just not possible to enforce them all the time. So, therefore I do believe that history tells us that it is time to change the RFA to make an explicit and enforcement rights, that if an agency fails to meet the standards, fails to do those analyses of how a rule affects small business, that it may be hauled into court and made to justify that its regulation is not arbitrary and not capricious.

I don't think this will be a tremendous burden on agencies. Many of them are doing a good job already. Some of them aren't. I think the threat of judicial review might be the motivator that requires them to do a better job.

I think that there have some other provisions in H.R. 9 that are also worthy of enactment. I would again congratulate the committee and urge that you recommend to the Judiciary Committee and to the Government Operations Committees and any other committees that are considering regulatory reform that there be no time wasted in the strengthening; go ahead.

I would be happy to respond to any questions.

[Mr. Swain's statement may be found in the appendix.]

Chairwoman MEYERS. Thank you very much, Mr. Swain.

We will now take questions from the committee. We try to take questions in the order of their appearance at the committee, so I will call first on Mr. Salmon.

Mr. Bartlett.

Mr. BARTLETT. Thank you very much. There is a story of yesteryear told about a small church in their midweek prayer meetings that reminds me of where we are in this problem today. Each week, apparently Sam would come and his prayer would be that the Lord would remove the cobwebs of sin, and this went on for week after week. Finally at one prayer meeting, Sally praised that the Lord will kill the spider in Sam's life.

I think that we are dealing with the cobwebs of the problem here, that is trying to ameliorate the problems of too much regulation and overzealous regulators. When I think that maybe what we ought to be doing is attacking the spider here.

There is an old country saying that you shouldn't do something when the juice ain't worth the squeezing. I suspect that in many of these regulations, particularly for small business and perhaps also for large businesses, that that is where we are. We are very good at enacting laws that require regulations, not good at all in going back later to see if the regulation makes any sense.

Is one of the responsibilities of the Chief Counsel to recommend those regulations that just don't make any sense for small business, or maybe don't make any sense for anybody?

Mr. GLOVER. Well, the Regulatory Flexibility Act requires the agencies to go back and do a periodic review of their regulations and look at the impacts on small business. When it was originally enacted, agencies were given 10 years, which was a fairly generous period to do that. I am sad to report to you that virtually no agencies have done that. The law puts the burden on the agencies themselves. There have been a few that have done that, but by and large, it has not been complied with.

We have noted that in many of our reports, that the agencies have not complied with that requirement of the law, but we report that there has not been—that it has not happened. We do go back with regulations, and we are working right now on that. When we see a regulation that we think is a particular problem, given our limited resources, we don't do the exhaustive review that we perhaps should do. But we do go back and when small businesses complain to us about a regulation, we do go back to agencies and petition that they modify their rules, and we have been somewhat successful in that effort.

We have had some very good success with the Environmental Protection Agency in going back to them with their regulations. Just this past December they agreed to modify one of their major regulations, that reduced 20,000 reports that small businesses were having to file. We thanked them very much for that.

Then we had a meeting with them 2 weeks ago and said boy, that was really great, but if you will just give us 2/10 more of 1 percent which will bring it down to 95 percent, 95.5 percent of all toxins released in the environment, if you will just give us another 2/10 of 1 percent, you will still have total reports on 99.5 percent, you will eliminate another 40,000 forms that small businesses have to

file. We are working with them. I think hopefully we are going to see that as well.

So, there are examples where we do that, and we would like to do more of it, and we are going to continue doing that. Quite frankly, in our discussions with OIRA, they have committed to work with us on those regulations, and we have sent them a list of some regulations that we think could be eliminated, and we are going to work with them on that. We have done that as part of the Vice President's Reinventing Government Program and we have had a good bit of interest from the office in helping that happen.

So, I think we are going to have some allies, it will not be just the Office of Advocacy, but other people in the Government who recognize that what you have said is true and we need to do more of that, and that is one of the things that we have devoted an awful lot of time to.

Chairwoman MEYERS. Mr. Glover, I am going to ask everybody if they can be fairly concise in their questions and answers, because we have two panels this morning.

Mr. GLOVER. Sure.

Chairwoman MEYERS. Ms. Velázquez.

Ms. VELÁZQUEZ. Thank you, Madam Chair.

Mr. Glover, I want to thank you for testifying before us today. You stated in your testimony on pages 20 and 21 that you do not believe that the RFA should be used as a tool by large businesses to increase their competitive advantage over small businesses or shift their costs to small businesses through litigation.

Would you please expand on that?

Mr. GLOVER. Yes. There was a provision that is not in this section that is 4003 of the Contract for America, or H.R. 9. That expands it beyond small business. What I am concerned about is, we hear from agencies quite often that gee, there is no problem with our regulations, in fact, we worked with all of the large firms and they thought these were just fine. The cost to small business is infinitely greater than it is to a large firm.

If you are selling 10,000 units, it would cost maybe 1 cent per unit. If you are selling 100 units, then obviously the cost is going to be $100 per unit. So, if you spread that compliance cost over a broader base, it may not be a problem. To allow large firms into this, I think is not appropriate.

Ms. VELÁZQUEZ. Thank you, Madam Chair.

Chairwoman MEYERS. Thank you. Let me ask a question, if I may, and then we will go back to our regular order. I would like to ask Mr. Glover, the advanced notice provision contained in section 6003 of H.R. 9 would seem to give your office some needed input on upcoming rulemakings.

Can you tell us how this feature of Reg Flex reform could be handled given the resources of your office?

Mr. GLOVER. Well, it would not be, in terms of priorities. Judicial review is the absolute number one priority. I think the ability to—the clear, clean ability, the direction of the sense of the Congress to file amicus briefs is important. Realistically, we use outside experts, we use small business people and we use trade associations as a resource to help us understand the rules and regulations.

In the preliminary stage, before there is any publication, that is all confidential. We can't go and talk to small business people about the proposed regulations, so our hands are somewhat tied. We don't have a large resource budget to do this, and we won't be able to make as much use out of that as it might appear, because we simply don't have the resources to do that, and I don't think even with more resources it would be as productive as some of the other provisions.

Chairwoman MEYERS. All right. Thank you.

Mr. Swain, I might say that in making speeches to small business groups, your name comes up every once in a while, so people do remember you and they remember what you did and how active you were in trying to promote this regulatory review, regulatory reform.

I don't know how much time you have been able to spend in studying the current language in H.R. 9. But is there anything in your opinion that we should do to strengthen or improve that bill and the way it is drafted?

Mr. SWAIN. Well, thank you for your comments, Madam Chair. I have looked at H.R. 9, and I won't claim to be a student on every single iteration of it, but I have looked at the version at least that was introduced, and I would strongly agree with Mr. Glover, that the most important section is the judicial review section.

I have some other specific comments in my prepared statement, but let me go through the four items just briefly with my own perspective, which is based on nothing more than my own experience and obviously not cleared by OMB.

I think that the judicial review section is the key section. The question that Congresswoman Velázquez asked is an important one that I haven't thought that much about myself, but who has standing to sue under the Regulatory Flexibility Act is one of those subquestions that ought to be hassled out. My own view is that it ought to be businesses that have taken part in the rulemaking process and can show that they are somehow adversely affected.

Now, how one defines a business as small or large, I would like to think about a little bit more. But I think that there ought to be a requirement that the business be, or the association representing the business be adversely affected by the proposed rule.

In terms of the question that you just posed to Mr. Glover about the advanced notice, I would agree with him. The agencies are issuing several hundred rules a year. The problem for the SBA is not that they don't have advanced notice, but that—I mean, there will never be enough people at the SBA. In my tenure in the mid-1980's, there were probably half. We had an office that had about 80 people. What is yours, Jere, about 65?

Mr. GLOVER. Fifty-seven.

Mr. SWAIN. So we were formally submitting comments on 50 rules a year, which is the tip of the iceberg. You just can't get too deep on these rules.

My concern about the advanced notice is that if an agency sends an advanced notice to the SBA before it is published in the register, first, would the SBA be free to share that proposal with other agencies or would it be constrained to keep it secret, because to

keep it secret, that doesn't help anybody, because we have to find out what is going on from the other small business groups.

Second, if the SBA didn't say anything about it, would the agency consider silence to be assent. If that advanced notice is to be made, it ought to be made clear that silence is not consent.

Third, indirect costs, I agree with the legislation. An agency can say, we are not going to do a Reg Flex analysis because the impact of our analysis is only on 12 lending institutions, and that is really not a significant number, and they would be right. But suppose those 12 lending institutions account for 20 or 30 percent of a certain kind of small business loans. The indirect impact on the small business community is significant, but the agency is successfully avoided its role under the Reg Flex law as it is currently written. So, I would encourage an expansion there.

Finally, the amicus issue. I made the statement in my testimony—in my prepared statement, Mr. Glover has pushed the edge of the issue. It is no secret to anyone on this committee that Government and principally the Justice Department is not warm and fuzzy about the idea of two Presidentially appointed executive branch officials squaring off against each other in court, somebody from the SBA, which is an executive branch agency, squaring off against somebody from the Department of Commerce or the Department of Agriculture. That is, I think it is a nonpartisan, bipartisan thing in justice departments that they just don't like that.

I don't think—I am not a constitutional lawyer, but I don't think it is unconstitutional. I think if the Congress wants the President to have his appointees act that way, they ought to give them clear directions and the law should be clarified in that regard.

Chairwoman MEYERS. All right. I appreciate that comment very much, and I thank you.

Mr. Longley.

Mr. LONGLEY. Thank you, Madam Chairman.

Mr. Swain, I heard your comment about you were recommending a provision that only an industry that had participated in the rulemaking would be in a position to challenge it under the RFA.

Did I hear you correctly?

Mr. SWAIN. Well, I did say that. I think I would want to think about the participation standard. I think that there would clearly have to be—there ought to be a standard that the industry or the company should be able to show some affect from the rule that it not just be a total bystander. As to the participation, I probably spoke too quickly off the cuff.

Mr. LONGLEY. If I could just pick up on that, because I want to lead to another question. It strikes me that a business that is having difficulty generating the resources to comply with a rule would, frankly, be very unlikely to even have participated in the process to begin with. But having said that, I want to go more to the heart of the RFA to find out how it was passed and how it has been implemented.

Is it fair to say that there have been specific employees in different departments that are charged with enforcing this act or attempting to advocate for it?

Mr. SWAIN. Well, yes. The principal enforcer or the principal advocate for RFA compliance is of course the SBA Office of Advocacy.

But within that—within the system of Federal rulemaking, of course every agency has an Office of Regulation or Policymaking or whatever that is in charge of administrating the rulemaking system within that agency, and I believe you will hear later on this morning from several of those people.

Every agency I think does it a little bit differently, but at least when I was in the Office of Advocacy, and I am sure the case is the same now, every agency had a contact person that was supposedly in charge of enforcement of the Regulatory Flexibility Act. So, if we noticed a rule published in the Federal Register that just was awful, we knew who to call that was in charge of the Regulatory Flexibility Act. Presumably that person could go down and sit with the man or woman that wrote the rule and get a better compliance. So, there is supposed to be a system of liaison.

Is that still more or less the case, Jere, a system of liaisons in every agency?

But I have to be candid. The ability of an agency, or the record of an agency complying is many times just directly dependent on the energy and effectiveness of the person in that position. If he or she quits or moves to another job, agency compliance can go down.

Mr. LONGLEY. I would just like to offer a comment from having listened to the testimony and frankly looking at another 200 or 300 pages detailing how we are simplifying the regulatory process, and this is an explanation of the simplification process, not the basic problem.

I want to just come back to what Representative Bartlett said a few minutes ago. I mean, we are not only not attacking the spiders, we are focusing on the webs and, frankly, feeding the spiders. Because it strikes me that what we have is a net increase in people dealing with regulating how the regulators regulate and now we are talking about broadening that even further.

It may be that there is a way of sharpening the judicial review process, but now we are talking about adding another branch of the Government to the process. It seems to me that the basic problem is regulation and perhaps the burden is really on the Congress to figure out a better way to attack the spiders as opposed to redesign the webs.

Mr. SWAIN. If I could make a comment on that, Mr. Longley, I think that is exactly the point. There will never be enough people in the Office of Advocacy theoretically, nor will there ever be enough people in agency policy offices to really do a good job with this. Sometimes we get better results than other times, depending on the personalities and the motivations of the people involved. In the end, if they know that judges will call them to task if they don't do it properly, that is the best thing that we can do to assure uniform compliance, rather than adding another 100,000 people to the process.

Mr. LONGLEY. So that is part of it, but really you come back to the heart of the question which is that Congress has got to focus a little bit more on the problem and not redesigning the cells, so to speak. I appreciate it.

Thank you, Mr. Chairman.

Chairwoman MEYERS. I think one thing that Mr. Swain said, though, that is very important is the fact just that the agencies

know that this regulatory mechanism is in place, is going to make sure that perhaps--I think it will mean that they will review their regulations before they send them over to the SBA. They will just be more aware and more cognizant of the fact.

If there is an enforcement provision in place, I think you have got a great deal more voluntary compliance than if it is just in the law with no enforcement mechanism because then it becomes more a suggestion than a real tool.

Mr. GLOVER. There were two laws passed in 1980 that were very important and they can go hand-in-hand. The other one is equal access to justice act. So, an agency cannot just ignore the law, wait for the judge to strike down the rule. If they file a frivolous answer, if they are not justified and have no good defense of their claim against a judicial review of Reg Flex, they are going to end up having to pay attorneys' fees to a small business organization that filed that lawsuit. So, it is a significant deterrent. It is a very important deterrent, and I think it will force the agencies to comply very quickly.

Mr. LONGLEY. Madam Chairwoman, could I just offer a comment to your last comment?

It is just coming really down to the point that it seems fair to say that the basic problem with regulation is that the regulators generally have such a limited focus on the problem and a limited understanding of the businesses they are seeking to regulate that, frankly, they may not have the ability to do it, and I think that it is time that we start thinking about different ways of holding people accountable and maybe drawing a line more carefully in terms of what we regulate and what we don't and, frankly, finding alternative methods to accomplish the same results.

Chairwoman MEYERS. Thank you, Mr. Longley.

Mr. Poshard.

Mr. POSHARD. Thank you, Madam Chairman.

Who are the agencies that are complying and which of the agencies are complying and which ones aren't? Who is most egregious?

Mr. GLOVER. Well, it changes from year to year and from time to time. Agencies that have had wonderful compliance histories sometimes backslide. Agencies that generally comply sometimes, because they interpret what Congress said to them or because they are predetermined to do something, don't comply on a specific set of regulations.

Then there are some agencies that you have several coming in today to talk about it who, at least the Office of Advocacy's opinion, simply make no effort. As we often say, some agencies miss the boat and some can't find the ocean. I would hope that we are going to see some more cooperation than we have had in the past. Clearly there is a strong commitment to work on that and we will hopefully see some improvement even amongst those agencies who have chosen to interpret the law rather narrowly.

Mr. POSHARD. Mr. Glover, I realize your reluctance to say publicly who is and who isn't, but can you give me that in writing?

Mr. GLOVER. We actually do that in our annual report each year. We basically discuss those things and we don't—we aren't reluctant to do that. We do it on a regular basis. All previous Chief Counsels, with the exception of about a 2- or 3-year period in which they did

not release the annual report, we point those things out in the annual report and we point out examples, the SEC, the Federal Trade Commission who have done a very good job. They were very conscientious about doing a Reg Flex analysis and we point that out.

Clearly the Internal Revenue Service, Agriculture Marketing Service are agencies which we pointed out consistently and all of the previous Chief Counsels with virtually no exception that I can remember have pointed out those problems. These are not new problems; these are simply problems that have been in existence for quite a while, and they choose to take a narrow or different approach, interpretation of the law than we have taken.

Mr. POSHARD. Let me get back for one moment, if I may, to the enforcement end of this.

What penalties are there in place if they tell you to go fly a kite? I mean, what have either of you done, and give me concrete examples of something that an agency has had to experience, a consequence they have had to experience as a result of not coming into compliance with the RFA?

Mr. GLOVER. Well, my past and many previous Chief Counsels have flown a lot of kites. We have been told to go do that and that is about all we could do. We do issue a report, we testify before Congress, we try to make sure that everybody knows the trouble—we certainly communicate with the agencies, we tell them.

We have got a couple of new things that didn't exist before, and that is the letter agreement with OIRA and OMB and the White House which is working. We have gone to them with specific problems, clearly having an Administrator at the cabinet meetings and having cabinet influence. I have taken the issues to them.

I have gone to the Vice President with issues, and in each of those cases, agencies that were not terribly concerned about whether they were complying with the Regulatory Flexibility Act have come to sit down with us and have assured us they are going to do better. Certainly there are some that we are going to work with in the future to make sure they do better.

So, what I have tried to do is maximize the influence of small business by working within the administration. I use whatever resources I have. Clearly going to the Vice President, clearly going to the—having the Administrator of SBA go to Cabinet meetings and buttonhole the head of EPA or whatever and say, hey, you need to sit down with Advocacy and try to work this out. We have had some very good meetings. I would say that clearly the fact that judicial review is under consideration helps us all convince people to pay attention to this.

Chairwoman MEYERS. Mr. Talent.

Mr. TALENT. The concern I have is whether the standard for judicial review is strong enough. Just give me your opinions on that.

Mr. GLOVER. I don't think the courts have had any trouble striking down rules that were arbitrary and capricious. By and large that is a very good standard, it has been held up for many, many years. I think it works, I think it will continue to work. I think in the case of small business, we simply have had no review at all. You are talking about lightyear forward advance, and I think it certainly works.

Mr. SWAIN. My sense, Mr. Talent, would be that if—that the Regulatory Flexibility Act would become one of the ways in which courts define an agency's action as being arbitrary.

In other words, right now, if an agency issues a rule without the proper notice and comment, then it might be regarded as arbitrary. But if it doesn't do the Regulatory Flexibility Act, the courts have said we don't believe that rises to the level of arbitrariness so as to set aside the rule.

So, what the Congress would effectively be saying is that, the way you define arbitrary is added to by a violation, nonperformance under the standards of the Regulatory Flexibility Act. I think that that would have to be worked out, the exact standards in a few court cases, but it is a tool that is simply not there at all now, and I think that properly drafted, it will be very effective.

Mr. TALENT. So in other words, you are saying you think we should be conscious of the fact that we are playing a part of legislative history in these hearings now and we might want to work on that with the committee report language also, but that violation of the Regulatory Flexibility Act would itself be by itself grounds for finding that the rule was arbitrary and capriciously promulgated under the Administrative Procedures Act.

Was that your understanding of what we are doing here?

Mr. SWAIN. That would be my view of what you ought to be trying to do, yes.

Mr. TALENT. What about review of any factual findings that may be at stake here? I mean, what standard review is involved in that, do you think? Is it a substantial evidence standard or what?

Mr. SWAIN. Well, that is—I mean, that is a good and a very relevant question. Because clearly, I mean the tough, the tough situation will be if an agency does a review, if it is an awful review, if it makes analyses that are patently absurd or inadequate. Again, I think that there are administrative law decisions which tend to illustrate the standards under which an agency's rulemaking record will be analyzed.

The Regulatory Flexibility Act will become part of the record. I would be happy to provide to the committee perhaps some further written comments and my own views on it. But I think that the legislative record should be crafted in reference to the key decisions that currently guide judges in administrative law today to ensure that the judge cannot only look at the fact that an analysis was done, but whether the analysis is worth the paper that it is written on.

On the other hand, I will say that we don't want to open this thing up so that we—every single "I" on every single piece of paper has to be dotted. I think that has to be—we can't have perpetual battles of experts on this, but there ought to be some standards that show that they can't just have a 1-page piece of paper that says Reg Flex analysis and consider their job done.

Mr. TALENT. I would agree. One of the problems of standards of review is you can talk about it, but it really comes down to an instinctive kind of where do you draw the line. Arbitrary and capricious is in some context the least strict standard of review, and I think I probably—we have seen the report language. It certainly would be my desire that the courts go further than that.

What I want them to do is to give the benefit of any reasonable and plausible doubt to the agency. In other words, if the agency conducts a fair review and makes a fair judgment, and there is something to be said for it, and the court ought to give them the benefit of the doubt, but not to the point where they accept, as you say, patently and plausible explanations or justifications.

There ought to be some teeth in that, this standard of review. I don't care what language you use, but as long as the understanding is that the arbitrary and capricious standards allows some teeth and allows the courts to really enforce the intent of the Congress, that is adequate for me, and I think that is probably what everybody on the committee wants, however we end up defining it.

Thank you.

One other question very briefly. Are you satisfied with the status of the amicus language? Do we need it, the language allowing you guys to file as amicus? I mean, I think you need to be able to do that when you want to do it. Are you satisfied with what we have in here?

Mr. GLOVER. I am not. I think the sense of the Congress isn't strong enough. I think it needs to be very clearly and explicitly stated that the Chief Counsel has a right to file amuses concerning the rules and as specifically concerning the regulations, and I think that language could be clearer and cleaner.

It would eliminate some unpleasant discussions that we have from time to time with the Department of Justice who would like to make that a very narrow interpretation and would like to tie the Chief Counsel's hands so that even if you are going to file one, you can file it for very limited purposes. I think you should look at that very carefully, eliminating any question about it.

Mr. TALENT. Well, I would agree. I don't see why the courts shouldn't have the benefit of the views of the agency or the office which is—which Congress has vested with specific control over this. The courts don't have to accept the views, but I don't see any reason why they shouldn't have the benefit of it when you feel or whoever is in your position feels like it is necessary to do that.

Mr. SWAIN. I think there is an important point here that the Justice Department likes to overlook, which is this is simply an amicus brief, it is simply in effect, an advisory opinion. The Chief Counsel would not be appearing as a party; he would—he or she would simply be appearing to express his opinion, and I don't think it does any injustice to the idea that executive gets to control his appointees to allow the Chief Counsel this limited role.

Mr. TALENT. Well, sure. This is not like—this is an agency where Congress and the President, if he signs this act, which I think he will, have decided in essence to set up a watchdog agency on other agencies. So, it is a unique situation where you can't necessarily—Congress doesn't necessarily warrant a unified frontier on the part of the executive branch agencies. So, I think it is not a precedent in other cases that the Justice Department needs to be concerned about.

Thank you. I thank the Chair.

Chairwoman MEYERS. Thank you, Mr. Talent.

Mrs. Clayton.

Mrs. CLAYTON. Thank you both for your testimony and thank you, Madam Chairman, for having the hearing.

Now that H.R. 9 is being proposed, how do you see that as reconciling with the current Regulatory Flexibility Act that you have, other than judicial review? I heard both of you indicate the judicial review of H.R. 9 obviously would strengthen the provision you have.

Mr. GLOVER. Well, I think that the other provisions we have talked about a little bit in the H.R. 9, it would—I think the amicus issue would be clarified as well. I think clearly the attempt to expand it beyond small business is a real troublemaker and it would create real problems down the road and create some real injustices.

Mrs. CLAYTON. Could you expand on what it would mean to have it all inclusive of all business? If you are not doing a good job now, then just say the basics, if there is a problem now of compliance of small business, then to the extent of universal, just comment on what that would mean.

Mr. GLOVER. Well, we described an example of whether this question of the EPA, whether they are going to regulate every service station in the United States or regulate the automobile manufacturers. If you have the automobile manufacturers going into court and sue for the rights, it may cost the automobile manufacturers 10 cents per automobile to do something, or even $10 per automobile, while it may cost service stations $20,000 a year, and the average service station dealer doesn't make more than $30,000 a year, so what you are saying is, he has got a capital cost that would basically put him out of business.

I don't want General Motors to be able to come in and sue the agency because they didn't get the least burdensome regulation on them. Clearly, small business can't spread those costs over as wide a base as the larger firm. It doesn't seem to be an appropriate and, quite frankly, it allows some large firms to abuse the regulatory process.

Mrs. CLAYTON. Thank you.

Thank you, Madam Chair.

Chairwoman MEYERS. Thank you.

I think we will have one more questioner with the permission of the committee, and then go to our second panel. The next one who arrived was Mr. Peterson.

Mr. PETERSON. Thank you, Madam Chairman.

Mr. Glover, to follow on to Mr. Poshard's question, in your testimony here a few weeks ago you in fact, named a couple of agencies. One was USDA which was the one you pointed out as being the one that didn't comply most often with this.

Can you give us any feel for what you have done to have them correct that? Is there any lever mechanism that you have in SBA that will bring them up to speed on this?

Mr. GLOVER. Well, we have had discussions with them for some few years, and more recently, we have had very serious discussions and the National Economic Council has gotten involved and has exerted some significant influence on them, and we are going to be meeting over the next week to 10 days and trying to resolve this dispute, and hopefully be able to report to you at some time in the future that they have agreed to come into compliance with the law.

Mr. PETERSON. All right.

Well, I just wanted to go on record as saying that given your testimony on that particular agency, I think it is incumbent on us as a committee and me personally to follow up on that in the future, so I will be watching whatever relationship improvements that are incurred there.

Going back to a point that Mr. Longley made the judicial review I think is very—I think it will strengthen this whole apparatus. But don't we have a clearinghouse in which these regulations have to go before they get out on the street, before they impact negatively on small business because it is actually a huge burden once it gets out there and small business has to comply, and then they go through the very high cost of trying to defend this thing or cut it back judicially later.

Mr. GLOVER. We do have that, and that is OIRA within the Office of the President. We do have a letter of agreement now where for the first time the Office of Advocacy is formally working with them and we are doing it on a variety of fronts, and that process has worked.

To date we have had some success where they have brought us regulations in the preproposal stage when they first get them and said, gee, their certifying just doesn't affect small business; do you think that is right, and we have reported to them, we don't agree with that certification. They have sent it back to the agency, that happened some months ago and it has not yet come back. So, hopefully, those kinds of actions help.

We have also used them to get some Government agencies to meet with us and to change their point of view. So, we have been successful certainly in the procurement area of making some success. We have gotten some assurances of compliance. While being in this job makes one somewhat cynical, I will tell you that assurances, I think, are real and I think there will be compliance and I think we will be able to report to you at the end of this year how well that Memorandum of Understanding and those activities have been successful. But to date, I will say that it has been very encouraging.

Mr. PETERSON. Well, I just want to again, I think, state my support for the judicial review, but not to suggest it is a panacea. I think that we are going to have to do multiple efforts here, and that is one that has to be strengthened, it seems to me, to make sure that we get these things stopped before they get out there and cause the damage they are going to cause.

One last question, Mr. Swain. I am very interested in your comment having to do with the Direct Lending Program and the rules that might come out of the Department of Education to support their position. That clearly is going to support their position in essentially making themselves a monopoly.

Have you any ideas on how and whether or not anything has come from that that would suggest that they are in fact, creating rules that lend to their position, and if not, how we might police it before they do?

Mr. SWAIN. Well, as you know, Mr. Peterson, the Direct Lending Program is a new creature authorized by Congress 2 years ago as a pilot program that the Department of Education has run direct

lending programs for part of student loans and the existing guaranteed program is to run alongside, and presumably at the end of 4 or 5 years, we will see which one works better.

My point was that in issuing the rules on how the Direct Lending Program operates, it is not apparent to me that the Department has been fully worrying about what the impact of those rules is on the private participants that are still trying to make the private program work. I would be happy to give you some further thoughts on that in more detail, but I think it is a good example of how an agency doesn't look at the indirect effect of its rules.

Mr. PETERSON. I would like very much if you could give me some of your background on that, because I personally feel that we should have let those programs run their course. We are finding problems already on this direct lending, even in my State, and I suspect in other States, and I hate to go into something that is going to do something 100 percent before we even tested it at the 10 percent level.

So, I think this regulatory process, it might be a very good vehicle in fact, to monitor the process of that.

I will yield back. I thank you, Madam Chairman.

Chairwoman MEYERS. Thank you, Mr. Peterson.

I might mention that in our next panel we will be hearing from Mr. Spotila, and then also from Mr. White and Mr. Roberts. The other gentlemen who are mentioned will be available to answer questions. But there will be three who will give testimony on the next panel.

I would certainly like to thank Mr. Glover and Mr. Swain and thank you very much for being with us today. We appreciate it. I think it will help us write better legislation.

I might mention to you, Mr. Glover, that in the last meeting you had stated some concern about 4003.

Mr. GLOVER. Yes, ma'am.

Chairwoman MEYERS. That seemed to expand the coverage of Reg Flex to businesses of all size and not just small business. That was of concern, we should walk before we run; it is going to be a rather substantial undertaking anyway, and as I understand it, the Judiciary Committee has removed that section so that now we are back to the Reg Flex Act that we know and love that we worked with last year that pertains just to small business.

We will be back again in 5 minutes and I thank you very much.

Mr. SWAIN. Thank you, Madam Chairwoman.

Mr. GLOVER. Thank you.

[Recess.]

Chairwoman MEYERS. The hearing will come to order.

I think we will probably have some more people who return in time. Until then, we had better get started.

Our first witness will be Mr. John Spotila. He is the General Counsel of the U.S. Small Business Administration. As I understand it, Mr. Spotila, you will be giving us kind of the administration point of view of this piece of legislation; is that correct?

Mr. SPOTILA. Yes, it is.

Chairwoman MEYERS. Mr. Christian White and Mr. Richard Roberts. So, we will start now with Mr. Spotila.

TESTIMONY OF JOHN T. SPOTILA, GENERAL COUNSEL, U.S. SMALL BUSINESS ADMINISTRATION, WASHINGTON, DC

Mr. SPOTILA. Good morning, Madam Chairman and members of the committee. Thank you for having me appear on behalf of the administration to discuss current efforts to comply with and strengthen the Regulatory Flexibility Act.

I am joined this morning by senior representatives of the Department of Transportation, the Occupational Safety and Health Administration, the Department of Agriculture's Agricultural Marketing Service, and the Department of Commerce's National Marine Fisheries Service.

After my consolidated statement, each of these representatives will try to answer any questions you may have. I ask that my written statement, and their individual written statements, be entered into the record.

Chairwoman MEYERS. Without objection, it is so ordered. Thank you.

Mr. SPOTILA. Thank you. As a former small business owner, and an attorney representing small business owners for 20 years before joining the SBA as its General Counsel, I have experienced the cumulative burdens imposed upon small business owners by Government regulations. I have dealt personally with costly recordkeeping, reporting, and substantive requirements, and know firsthand about paperwork and compliance burdens. Small business owners are creating jobs in this economy. It is important that regulatory agencies consider the impact on small entities of their proposed rules and then minimize adverse effects as much as possible.

For all of these reasons, I was very pleased in 1993 when the National Performance Review under the direction of Vice President Gore strongly endorsed the idea of adding a right of judicial review to the Reg Flex Act. I spent a considerable amount of time last year working with others in the administration to try to implement that recommendation.

My good friend, Jere Glover, has been a strong ally and partner in that endeavor. We both want to see a prompt passage of a Reg Flex judicial review provision which benefits small entities in three ways: By encouraging better regulations, by affording access to the courts for relief, and by not bogging people down in a lot of unnecessary litigation.

Last October, President Clinton reiterated his personal support for strong judicial review of Reg Flex determinations. He wants a provision which will give meaningful redress to small business owners and other small entities. Today, on his behalf, I reaffirm the administration's support for this important small business initiative.

At the direction of the President and Vice President, and with the assistance of Sally Katzen as head of the Office of Information and Regulatory Affairs, OIRA, and Jere Glover, as Chief Counsel for Advocacy, Federal regulators have improved their compliance with the Reg Flex Act. Real progress has been made. That progress has occurred in the context of a broad administration commitment to regulatory reform, with growing sensitivity to the special concerns of the small business community.

As you know, on September 30, 1993, President Clinton issued Executive order 12866 in an effort to streamline the regulatory process and reduce unnecessary regulatory burdens.

At the SBA, we immediately began working to implement the President's directives. In cooperation with OIRA, we initiated an unprecedented interagency effort to identify regulatory reforms that would be of particular benefit to small business. The Department of Labor, Transportation, and Justice, the Food and Drug Administration, the Internal Revenue Service, and the Environmental Protection Agency all joined with us. They formed interagency working groups to examine the effects of regulation on five distinct industries: Chemicals and metals, restaurants, food processing, trucking, and environmental disposal and recycling services.

Each working group met last year over a period of months to consider comments from 150 small business owners and their representatives and 80 agency personnel. When the groups issued their findings in late July, they included some 140 recommendations which now are being evaluated and, in many cases, implemented by the participating agencies. EPA, OSHA and the IRS, which traditionally may not have been well thought of by small business owners, have been particularly cooperative and energetic in expanding their outreach to the small business community and considering suggestions for reform.

Our experience with this interagency effort has direct relevance today. We found surprising consensus among small business owners from every part of the country. They did not tell us that the air is too clean or their workplaces too safe. They did not say that we should stop inspecting meat or making sure that airplanes are safe. They did tell us that they want early and continuous involvement in regulatory development, better access to regulatory information, and an emphasis on compliance assistance rather than harsh enforcement. They want us to eliminate paperwork, streamline forms, and get rid of unjustified regulations.

When it comes to the Reg Flex Act, they want the right to seek judicial review of agency decisions, but most of all they want the agencies to do a better job of developing regulations so they won't have to bother with litigation to protect their interests.

President Clinton and Vice President Gore clearly hear what small business owners are saying. They have directed their administration to comply with Reg Flex. Jere Glover, as Chief Counsel for Advocacy, and Sally Katzen, as head of OIRA, are working together to increase agency compliance. But even so, I reiterate the President's support for passage of a strong, carefully drafted judicial review provision.

Any administrative approach is dependent on the particular individuals involved and the resources available to them. Individuals come and go. There is a risk that some Federal agency in the future might disregard its obligation in this area. The President and Vice President believe, as I do, that the objectives of the Reg Flex Act are too important to be ignored.

The challenge in adding a right to seek judicial review lies in crafting language that will give small entities meaningful relief while not requiring them to spend a lot of time and money in litigation. Most small business owners want no part of litigation. What

they want, instead, are better regulations. They want a judicial review provision that is clear and complete, encouraging sound regulatory development and giving proper guidance to all so that lawsuits are needed only if and when regulators ignore their Reg Flex obligations.

With these principles in mind, we would like to suggest, respectfully, that the committee consider the following points: First, the Reg Flex Act properly focuses on protection for small entities. Requiring agencies to perform Reg Flex analyses for other businesses would change the emphasis of the underlying statute and force agencies to divert scarce resources that could be better employed to protect small businesses.

We were therefore pleased to hear your comments, Madam Chair, about the actions of the Judiciary Committee, because we certainly believe that we ought not to extend to large entities the right to initiate litigation, particularly in situations where small entities are pleased with the regulatory approach followed by an agency.

Second, although it may seem appealing to merely repeal the ban on judicial review now contained within the Reg Flex Act, this may not be the approach that serves small entities best. We are concerned that small entities would find themselves involved in continuing litigation over the scope, nature and timing of review. This would impose costs upon them which could have been avoided by a more specific judicial review provision. In the absence of clear statutory direction, there is always the possibility that the courts might be less favorable to small entities than the proponents of judicial review intended.

We suggest to you, again respectfully, that it makes sense to specify a time limit for bringing the actions for judicial review to clarify the standard of review, and to make it clear when and to what extent relief can be given if the courts find that an agency has not complied with the Reg Flex Act.

But whatever the final resolution of these questions, the statutory guidance should be made clear, so that small entities and the agencies not find themselves embroiled in unnecessary litigation.

Reg Flex properly focuses its attention on the development of final rules by the regulating agencies. So, as a third suggestion, we think it makes very little sense to tie up the courts with litigation over proposed rules or such other matters as 10-year plans or regulatory agendas, and this point should be clarified in any judicial review position.

Finally, we believe that it would be a mistake to extend the Reg Flex Act to an assessment of indirect effects of proposed regulation. It is very difficult to assess these effects with any degree of accuracy. Even if agencies proceed in good faith, they may be drawn into litigation because of the ambiguity of the statutory language. Instead of requiring agencies to concentrate on mitigating the direct effects of what they propose to do, we end up diverting attention and encouraging wasteful litigation.

These suggestions warrant consideration. The President strongly favors prompt passage of a meaningful Reg Flex judicial review provision. He appreciates how important this proposal is to small business and other small entities. At the same time, the statutory

language can and should be improved, and we would be happy to work with the Congress on this important legislation.

With me today are senior officials who are knowledgeable about the implementation of Reg Flex within their agencies. While each would be available for questions, I would like to offer some general observations about their regulatory activities regarding small business. Reg Flex is an important aspect of an overall effort to improve the regulation of small businesses. Federal agencies have, over the past 2 years, made significant efforts to improve the development of regulations, the dissemination of regulatory information, and the furnishing of compliance assistance.

The Department of Transportation, for example, has tried to maximize public participation by small business. Through advanced notices, informal public meetings held in the evening or on weekends, teleconferences and negotiated rulemakings, DOT has learned from regulated small businesses. It hopes to establish an electronic docket which will enable small businesses to access proposed rules on their own computers and comment on those proposals with a minimum of effort.

It has also taken the lead in educating regulated parties about new and existing regulations. Plain English letters to trade associations and specialty publications help small businesses learn about new regulations. The Highway Administration even produces programs that are broadcast on late-night trucker talk shows. This customer-sensitive innovation carries over into compliance activities. DOT has used such techniques as tiering, phase-ins, 800 numbers and short forms to help small businesses and to see that they are provided with maximum flexibility and compliance.

The Labor Department has also taken steps to reach out to small businesses, both in rulemaking and compliance. OSHA frequently offers compliance advice and assistance to small businesses. Last year almost 24,000 firms took advantage of this service. Through a program called SHARP, OSHA uses incentives to encourage small firms to correct severe hazards. Last year more than 1,400 businesses participated in that program.

As this suggests, Reg Flex is but a part of the administration's larger efforts to improve the regulation of small businesses. In recent years, Reg Flex has led to significant improvements in regulations.

But for all of these successes with Reg Flex, we recognize the need for further improvement. Some of the issues concerning Reg Flex arise from differences of opinion about the applicability of the act. The Agricultural Marketing Service, for example, has long treated marketing orders as meeting the requirements of Reg Flex. As its administrator can explain in more detail today, it views marketing orders as a form of regulation that small businesses initiate, rather than one imposed upon them. The vast majority of producers under their orders are small businesses. Because producers vote normally by a two-thirds vote to approve an order and can vote to terminate one, the service has taken the position that approved orders represent a form of self-help alternative for producers.

The National Marine Fisheries Service has adopted an analogous position with regard to fisheries regulations which are developed by

local management councils, most of whom are small businesses. The Chief Counsel, of course, has a different opinion about the applicability of Reg Flex and fishery management regulations.

I think it is a very positive step that under the auspices of the National Economic Council the Chief Counsel will soon meet with both agencies to try to resolve these interpretations of Reg Flex. Certainly these cases, though, illustrate a broader lesson that Reg Flex should be applied with some flexibility. If it is the case that marketing orders and fishery management plans are requested by small businesses and help small business, then mechanical application of the Reg Flex should not be done in a way that does more harm than good.

I am not in a position to resolve the difference of opinion between the Chief Counsel and the two agencies, but we all agree that all agencies should comply fully with Reg Flex. I join Jere Glover in observing that while much needs to be done, compliance with Reg Flex has been improving and as a direct result, agencies are promulgating better regulations. Under the President's guidance, agencies are becoming increasingly responsive to the concerns of small business.

I thank you for giving me the opportunity to speak with you. I and my colleagues would be happy to try to answer any questions you may have at the appropriate time.

[Mr. Spotila's statement may be found in the appendix.]

Chairwoman MEYERS. Thank you very much. You say just on the last page of your testimony, Mr. Spotila, that the Chief Counsel for Advocacy has a different opinion than the General Counsel for the U.S. Small Business Administration.

Is that what you are saying?

Mr. SPOTILA. No, I am not saying that at all, Madam Chairman. What I am saying is that the Chief Counsel for Advocacy has a different opinion than the Agricultural Marketing Service and the National Marine Fisheries Program.

Chairwoman MEYERS. Well, I was confused about that.

Mr. SPOTILA. I am sorry if I was not more clear. We suggested—the National Economic Council has decided to intervene to try to resolve that, so that we end up with full compliance with Reg Flex which is certainly the President's directive and wish.

Chairwoman MEYERS. We appreciate your suggestions very much, Mr. Spotila. Like you, I think we were glad to hear—I mean I don't know that they specifically have had their markup yet in Judiciary, but I think that I have been led to understand that they are going to take out Section 4003, which was troubling to some people on this committee.

Mr. SPOTILA. We thank you for your personal efforts in that regard, Madam Chairman. I know you were instrumental in persuading them.

Chairwoman MEYERS. All right. Let's see.

Mr. Wyden.

Mr. WYDEN. Thank you very much, Madam Chairman. Let me also thank you for your efforts on the Judiciary Committee front. I think you have heard me say that my view is what our country hopes through the Regulatory Flexibility Act is that we would have what amounts to an HOV lane for small business, so that small

business would get fast track consideration of the kind of implications these regulations have them.

I am very hopeful that we will prevail administratively in your discussions with Mr. Hyde, that this will be corrected at that level. But I want it understood that we Democrats will make a fire storm on the floor of the House if that isn't corrected. Because it is wrong to take a statute which is really designed for fast track consideration in these rules for small business, to turn it into something that in effect, says everyone, no matter how large, is going to be considered through this realm.

I want to thank you, Chair Meyers, for your efforts, because I know you have been up against tough sledding with respect to the contract and how it is written and we on this side appreciate the advocacy you have been doing with the Judiciary Committee. I hope it is successful. If it is not, we are going to have one doozie of a floor fight on this issue.

The question I did want to ask is one I touched on earlier, and that is that I hear from small businesses continually at home that in effect, playing by the rules doesn't count for anything. I have a funeral home, for example, who has complied with all of the health and safety and various other kinds of regulatory requirements. They have had all of their people trained and their facility inspected and the like, and after this was done several years ago, they have had no problems and essentially no changes in employees. So, it is all the same people, no evidence of any problem.

This funeral home has essentially said to me, doesn't compliance count for anything in the Federal regulatory system? Why should we be put through exactly the same kind of water torture when we have the same people, we have gone through all of the regulatory hoops; there has been no problem, and yet the Federal Government wants us to recycle this time-consuming effort.

My question, and perhaps Mr. Spotila can talk about this, as part of the Vice President's Reinventing Government, are there any discussions underway in terms of trying to give a break to small businesses who have a proven track record of complying with the rules? I kind of, when I talk to small businesses, but it in the context of maybe they ought to get time off for good behavior. But I am curious whether in your discussions with respect to Reinventing Government, whether there is any consideration being given now to some relief for small businesses with a proven track record of complying with the rules?

Mr. SPOTILA. I think the answer is yes, and let me just give a moment's background. The President has asked the Vice President to, as part of kind of a second phase of the National Performance Review, to focus sharply on the issue of regulatory reform. The Vice President is currently undergoing a series of intensive briefings which really reflect the counseling from within the administration, different areas of the administration, giving suggestions for strong measures that could be done that reflect new initiatives in the spirit of the NPR to improve the act of regulation, the development of regulation, the compliance efforts and the like, and that includes a particular focus on small business.

We have suggested to the Vice President, and I think that he has heard us clearly, that regulations should necessarily be prepared

only with some understanding of the risk that you are dealing with, the problem you are trying to resolve.

Mr. WYDEN. My time is short. Will compliance, a proven track record of compliance, count for anything in terms of future regulatory proposals? That is what I am most interested in.

Mr. SPOTILA. We think that it should count. There may be instances where some follow-up is still needed to meet the regulatory goals, but clearly a strong compliance record should be a factor.

Mr. WYDEN. Thank you, Madam Chair.

Chairwoman MEYERS. Thank you, Mr. Wyden.

Ms. Kelly.

Ms. KELLY. Thank you, Madam Chairman. I would like to address a question if I may to Mr. Dear.

Mr. Dear, I am interested in the testimony you submitted here today, and I recognize that OSHA has a strong responsibility in making sure that the workplace is safe and I think the effect of a lot of the regulations has been to do just exactly that.

I am somewhat concerned because I am a small businesswoman, my husband is a small businessman. We are concerned with the fact that very often when we meet regulations and standards, our workers will ignore what we have done, and just exactly as has been pointed out, we have met the law. We get no points for good behavior when we face your committee or have a hearing if we have an accident.

On page 5 of your testimony here that you have written, you have given an example of an employee from a small 20-employee wood-framing contract firm in Sioux Falls, South Dakota losing his life. The worker slipped while he was installing roof decking. I know from the firsthand experience that when we provide fall protection for our people, when we provide goggles, special gear, boots, whatever, the goggles, the special gear, the boots reside in the trunks of our workers' cars, even though we do our best to get to every job and make sure that they have those pieces of equipment on them.

I hope I am speaking for the legions of us out there who provide all of the safety equipment and try to do the—meet the regulations, only to have our efforts stymied at the worker level. What I would like very much to see OSHA do is reach forward to the worker and help us make sure that they will live by the regulations that we have been told we must live by.

There is also a certain assumption of the risk for all of us with everything that we do in the workplace. While we are going to continue to lose people, I want to know where your efforts are directed, if any, in this regard, to helping our workers understand that we are not just handing them this stuff to throw in the trunks of their cars.

Mr. DEAR. I share your concern. My experience with business owners, large and small, is that the vast majority of them care about safety and health. They know it is a good business practice to have a healthy and safe work place. We are stepping up our efforts to improve compliance services to businesses.

Mr. Spotila mentioned the OSHA consultation program. We fund efforts in every State. Last year, almost 24,000 firms were assisted by that program. An element of that program, the SHARP Program

provides an exemption for compliance inspections from firms which develop a comprehensive safety and health program for their worksite. We expanded participation in that program by 20 percent last year and we are trying to expand it further this year.

Both you and Congressman Wyden asked the question about what consideration OSHA or other regulatory agencies can give to the good-faith effort of employers to comply with our standards. We already recognize, as an employer defense, their effort through their own management to insist on compliance with OSHA regulation for their employees. That is something that is currently available.

I think we ought to have a discussion both in terms of compliance assistance and regulatory revision which helps move the discussion toward performance. Are the results good? Are injury and illnesses declining? If so, there should be serious consideration of reduced or no penalties, and additional time to come into compliance. Because it is the reduction of injury and illness that the Occupational Safety and Health Act was created to address not citations and penalties.

I am often asked, a further part of your question, what can OSHA do about the failure of individual employees to comply with our standards? I don't think that employers really want OSHA to come in and be their personnel manager as well as their safety and health manager. The management responsibility for what employees do on a job site really does need to stay with the business owner. But we do need——

Ms. KELLY. We need some help in that area though, sir.

Mr. DEAR. For example, we have a request in our fiscal year 1996 to greatly expand, it is relatively small in budget terms, but to greatly expand the number of targeted training grants that are available so that we can work with nonprofit organizations to develop education programs to help with compliance assistance. So, I think there are a lot of things we are doing, and there are many more things that I believe we can step up to help you and other employers improve safety and health. You should not have to conduct these operations out of fear that an agency is going to come in and seek a confrontation and start with the assumption that an employer can't be trusted to be concerned about worker safety and health.

Ms. KELLY. Would you be willing to send to my office some of the written—just write down a few of the things that you have been doing to help us help our workers comply with the things we are trying to get them to comply with?

Mr. DEAR. I would be happy to do that.

Ms. KELLY. I thank you.

[The information may be found in the appendix.]

Chairwoman MEYERS. I wonder, with the permission of the committee, I would like to return to our witnesses. I would like to hear briefly from Mr. White and Commissioner Roberts before we continue questioning, and then we will return to our questioning. We would like to hear from everybody.

Mr. Spotila has spoken for the administration, and of course Mr. Roberts and Mr. White are with independent agencies. So, let's start with Mr. White.

TESTIMONY OF CHRISTIAN S. WHITE, DIRECTOR, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, WASHINGTON, DC

Mr. WHITE. Madam Chairman, thank you very much. It is indeed a pleasure to be here on behalf of the Federal Trade Commission to talk about the historical role of the Regulatory Flexibility Act and the Commission's mission.

The Commission has produced a statement for the record. I hope that will be entered into the record. I won't try to labor my way through all of it. But there are some highlights that I would like to talk about.

Chairwoman MEYERS. Thank you. We would appreciate that, Mr. White, because our time is so short, because we had two votes in the time of the hearing, and so if you could just summarize, we would appreciate it.

Mr. WHITE. I will be as brief as it is possible to be.

The statement of course represents the views of the Commission formally adopted. My responses to questions that you may have of course are my own and not necessarily theirs.

Let me just say that the Commission has a very broad responsibility in antitrust and consumer protection at the Federal level. I am going to talk today just about consumer protection, because with very few exceptions, that is where the rule activities fall.

We enforce the general requirements of the Federal Trade Commission Act that prohibits unfair methods of competition and unfair or deceptive acts or practices. We also have enforcement responsibility under about 30 other statutes that cover a blinding variety of topics, but that fall generally in the area statutes where Congress has made a finding that consumers ought to be provided with specific information that helps them make the choices they need to make in the marketplace, or where patterns or practices of consumer difficulties have indicated a need for some changes in the rules of the game. So, most of the Commission's regulatory activities, certainly in the last 10 years, have involved the implementation of statutes where the Congress has given the Commission a very specific directive.

The Commission also enforces a variety of rules that have been adopted under its general mandate, and we will talk a little bit about some of those.

The goal of the Commission over virtually all of its history has been very consistent: Protecting consumers, providing consumers with information, as I said; and in narrow instances where the market appears not to provide what consumers require, stepping in.

At present we are focusing our resources on those areas that seem to be affecting consumers the most; injured consumers particularly. False advertising is an old staple of ours, as you well know. Telemarketing, fraud, investment fraud and health care fraud are areas of particular concern as well as other deceptive practices.

Last year late we brought our first case that involves an old scam, but being practiced in a new way over one of the on-line computer services. So, the development of new ways to communicate with consumers challenges us to be sure that those new avenues

can be available to consumers for their benefit, but that the scam artists don't clog them up with both old and new scams.

Most of what we do, Madam Chairman, involves bringing lawsuits under these statutes against specific firms that violate Federal standards for consumer behavior. My statement covers that activity in some detail, and I won't rehearse it here.

As I said, making rules, examining rules, revising rules, both under specific statutes and under the Commission's general authority is of course an important part of what we do. Our statute imposes on the Commission a very high standard, both procedurally and substantively before rulemaking is initiated. The Commission has determined that under its general statute, the record that my staff has to put together ought to contain a preponderance of substantial reliable evidence in support of the proposed rule before that rule is issued.

Before issuing rules, the Commission also believes that the public interest calls upon it to answer very specific questions. Is the act or practice that the rule addresses prevalent and is it widespread, or only being practiced by a few, in which case that litigation might solve the problem. Does the practice cause significant harm to consumers? Will the proposal address narrowly and reduce that harm? And will the benefits of the rule exceed its costs?

When issuing a rule at the end of the process under the Trade Commission Act, the Commission is required by the act to issue a statement that explains the rule and includes the statement, again, on how widespread the acts are that are addressed, the statement on the manner and context in which those practices arise, and then finally, a statement on the economic effect of the rule, taking into account the rule's effect on small business and on consumers.

The statement addresses at some length the Commission's program for reviewing all of its existing rules and all of its nonrule interpretive guides to evaluate their economic and other impact. I will simply say that we have found it useful to apply the principles that the Regulatory Flexibility Act has given us in the context to which the statute doesn't technically apply.

Madam Chair, the statement contains a discussion of the Commission's major regulatory actions since 1985, and I won't go through that except to say what I think it shows what it is intended to show is, that our focus has been principally on carefully implementing the specific statutory requirements that require rulemaking activities by the Commission. In several instances we have evaluated existing rules and tried to find ways for them to work better to reduce compliance costs and make the rules more effective for consumers.

The Commission's regulatory review program has showed us that there were a number of rules, three particularly, that were unnecessary. Those have been repealed, and more than 100 other actions have been taken to make the rules that we have in place work more effectively.

Just yesterday the Commission announced a proposed rule that I think is indicative of these—this approach to the rulemaking activity. It is the rule that implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, and I will say that we are at the proposed rule stage, so we are going to learn a lot more

about this regulation from here on out. But we have spent as much time as we possibly could, given the statutory time deadline upon the Commission, talking to the businesses and small businesses that are potentially affected by this rule.

We have decided—the Commission has decided to include a threshold cutoff, that is, not to apply the rule to very, very small businesses who do not make very many sales per year.

Another decision made by the Commission in the telemarketing area was that the rule ought to apply not just to consumer transactions, but also to a narrow category of business-to-business telemarketing, that the Commission's experience shows are almost always, or substantially afflicted with fraud.

Telemarketing fraud is a problem not just for consumers phone calls during dinner, if you will, but it is practiced against businesses, particularly small businesses, that don't have strong internal purchasing structures. So, we hope that the rule will have a positive impact for small businesses.

That rule also illustrates one point that the Commission's testimony sets forth, and that is that there are times when the agency makes a preliminary finding that a rule will not have a substantial impact on a significant number of small businesses.

In those instances, we virtually always go on to ask the public to submit any information that would bear on that question. It may be that we are going to learn something in the course of the rulemaking that would cause the Commission to change that view. So, we always try to get that information. We cite in the testimony an example of modifications to the Fair Packaging and Labeling Act in which we receive sufficient information that, although technically it wasn't required, the Commission did a final regulatory flexibility analysis to put to rest any issues on that point.

You have asked for some comments on Title VI of H.R. 9, and I will simply say that the Commission's experience in soliciting input on regulatory analyses suggests that the committee ought to be skeptical, I believe, about the agency's ability to obtain solid information about indirect effects of regulation. We try to examine the effects of everything we do, but we find it is often difficult to get good, sound information from the affected interests. So, I think if agencies will examine carefully and thoroughly the effects of regulatory actions, that the public interest and the small business interests will be well served.

The Commission also in its statement suggests that to the extent that the Congress decides that regulatory flexibility determinations should be reviewable judicially, that general principles of administrative law, that enhance the efficiency with which courts can entertain appeals, such as standing requirements and limitations of judicial review to final agency actions, would help focus everyone's time and attention on the issues that matter.

Finally, the Title VI would require agencies to notify the Chief Counsel for Advocacy 30 days before publishing a notice of a proposed rulemaking. I will simply say, we believe the FTC has achieved over time a good working relationship with the Chief Counsel's Office. I can say the current Chief Counsel is the first FTC staff member that I met when I came to work at the FTC al-

most 25 years ago when he was protecting small businesses by enforcing the antitrust laws.

We are concerned about any steps that extend the time period for conducting a rulemaking. It is an arduous and important process. So, we would hope that the statute can be drafted in such a way that the process is not automatically extended; the Commission certainly understands the importance of ensuring that the Chief Counsel can have positive impact in the process of developing rules. Clearly, the preparation and development of the record and the initial decisions about the need even to begin rulemaking are critical steps in the juncture, and no—we support the notion that the Chief Counsel's office would have an important role to play there.

Let me stop in the interests of time. Of course I would be happy to take questions.

Chairwoman MEYERS. All right. Thank you, Mr. White.

[Mr. White's statement may be found in the appendix.]

Chairwoman MEYERS. Mr. Roberts, we would like to hear from you, and I might mention that both the FTC and the SEC have had excellent records in compliance with the Regulatory Flexibility Act, and we are very happy to be able to mention that today.

Mr. Roberts, again, in the interest of time, if I could ask you to specifically focus your remarks, although you are certainly free to say anything that you would like to, but I would like you to specifically focus your remarks on the Regulatory Flexibility Act. What is wrong, as in H.R. 9, what can we do to improve it; what is wrong with it, what is right with it.

So proceed, Mr. Roberts.

TESTIMONY OF RICHARD Y. ROBERTS, COMMISSIONER, SECURITIES AND EXCHANGE COMMISSION, WASHINGTON, DC

Mr. ROBERTS. Thank you, Madam Chairman, Congressman Bentsen, it is a pleasure to be here and testify on behalf of the Securities and Exchange Commission, which I will refer to as the SEC or the Commission, regarding the provisions in H.R. 9 that would amend the Regulatory Flexibility Act.

As you stated, Madam Chairman, the SEC takes our Regulatory Flexibility Act responsibilities very seriously. In addition to our Reg Flex responsibilities, it is my belief that the SEC has also always held the interest of small businesses in high regard.

Now, from that background of attempting not only to adhere to our Regulatory Flexibility Act responsibilities, but of interest overall in small business issues, the SEC approaches H.R. 9 from the viewpoint of seeking regulatory flexibility for both the regulated and the regulator.

The SEC, as a matter of practice—and we are very proud of this practice—works closely with the entities that we regulate in order to fashion rulemaking that protects investor interests in the least burdensome way possible. This is true for both large and small businesses, as well as others impacted by our rules.

While I applaud this committee's desire to encourage greater participation on the part of the SBA and the rulemaking of other agencies, I would suggest caution before adding any procedural delays or complications to the rulemaking process. Sometimes delays can

impose unnecessary costs to both regulated and regulator. In a time where agencies are being asked to streamline operations, a strong argument can be made that unnecessary delays or obstacles should be avoided.

The SEC has only a few suggestions specifically concerning the regulatory flexibility provisions of H.R. 9. They, of course, are contained in the written statement which was submitted for the record. I will summarize briefly.

We have concerns with other portions of H.R. 9, but these were provided in writing to the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary.

With respect to the Regulatory Flexibility Act provisions of H.R. 9, first, as others have before us, we think the focus should be limited to effects on small businesses only, rather than "other businesses and individuals."

Second, we understand the need for an enforcement mechanism through a judicial review provision, but urge Congress to limit any new judicial remedy so that it is less likely to create yet another class of unnecessary, unlimited and unproductive litigation.

Third, we believe that the SBA should be active in advising agencies about their rulemaking, but as Jere Glover testified this morning, we question whether a 30-day, prepublication waiting period is the right answer. The SEC stands ready to work with the committee in terms of drafting appropriate responses to the current concerns that I have raised.

In conclusion, I wish to repeat a point I made at the outset. The SEC is committed, to the extent consistent with investor protection, to reducing unnecessary costs and burdens on small businesses. We view this as not merely consistent with the Regulatory Flexibility Act, but as part of our overall mission under the Federal securities laws to protect investors with the least possible interference with our capital formation system and our securities markets.

With that in mind, I would be happy to attempt to respond to any questions that the members of the committee may have.

Thank you.

Chairwoman MEYERS. Thank you very much, Mr. Roberts.

[Mr. Roberts' statement may be found in the appendix.]

Chairwoman MEYERS. Mr. Bentsen.

Mr. BENTSEN. Thank you, Madam Chairman, and I will be quick, because we have a vote.

I actually have some questions for Commissioner Roberts, which related to H.R. 9 as well as some others, because I don't know whether I will have an opportunity to have you testify before me again.

But Madam Chairman, I would like to ask unanimous consent to put a statement in the record, if I might also, with respect to this hearing.

Chairwoman MEYERS. Without objection.

[Mr. Bentsen's statement may be found in the appendix.]

Chairwoman MEYERS. I think maybe in light of the vote, we will stay another 6 or 7 minutes and then adjourn. I would like to ask unanimous consent to keep the record open, because I think Members will have questions that they want to submit to you, and if we could do that in written form I would appreciate it very much.

So ordered.

[The information may be found in the appendix.]

Mr. BENTSEN. Thank you, Madam Chairman.

Commissioner Roberts, one, I noted your comment on the RFA and how it affects small entities and what the SEC has done in providing various flexibility with registration for raising capital, and I think that is important. I hope that you will carry that forward as you look at the municipal securities area, which is not the purview of this committee, but again, you have the same sort of costs and I know that there has been some discussion of going back and relooking at the Tower amendment and whether or not there should be registration for municipal securities, but that is for another day. But I think many of the factors are still there.

I am interested in H.R. 9 and your thoughts. The bill, as I understand how it is drafted, would expand the scope beyond small business. It is unclear how far it would go. But do you believe that there is any sort of issue of safety and soundness, investor concerns that might limit the amount of registration and disclosure that is required for larger businesses?

The benefit we are trying to give the smaller businesses, but would also be giving to the large businesses, is more frequent issuers in the marketplace. Do you see any problems with that? Do you see any problems as well where larger businesses might be able to use—access this through subs to raise capital, and that might cause some investor problems?

Mr. ROBERTS. Well, certainly. I believe if the scope is expanded, as was apparent in the early draft of H.R. 9, that it could pose some problems in these areas. More importantly, it may provide protections to larger businesses that are necessary. They have other opportunities to avail themselves of remedies to take care of those situations.

As I stated in my testimony, we attempt to work with both small and large businesses and certainly we attempt to work very closely with all facets of the securities industry in developing regulations. It is very difficult to be specific right now or to quantify anything in particular. But yes, I do share your general concern, and again, I would rather limit it to small business concerns unless someone can provide me with a better reason not to.

Mr. BENTSEN. I appreciate that.

Do you see any impact that RFA may have with this, and you may not see much activity in this. There has been a lot of discussion of derivatives and on my other committee, the Banking Committee we have been discussing derivatives and whether or not there is a need for any sort of regulation. I am not sure yet that there is.

I still believe that the agencies have sufficient authority at this time, and I think we are still trying to figure out whether it is a disclosure issue or what. But do you see much activity in the small business market with respect to derivatives, and do you think there needs to be some discussion of that as it relates to the Regulatory Flexibility Act?

Mr. ROBERTS. Congressman Bentsen, I am unaware of much activity in the derivatives area in the small securities area for the simple reason that derivatives activities usually require a capital-

intensive operation that would preclude most small business involvement.

Having said that, I am aware of senior securities professionals that have left a large firm, started a small firm and advised a company or an investor or a fund or something of that nature about derivatives matters. Such an operation probably falls in the small business category and is involved at least in the periphery on the investment advice end of being involved in derivatives transactions.

We will be coming out with some new disclosure requirements in the derivatives area in the not-too-distant future, probably. I am unaware of any appreciable impact that they would have on small business. But certainly this is something we need to keep in mind. I do share your opinion that the Commission probably does have the authority to deal with most of the problems in the derivatives area that we are aware of without the need for any additional legislation.

Mr. BENTSEN. I appreciate that.

One final question if I have time. There is the discussion of the moratorium—regulatory moratorium bill and there are a couple of bills out there. I have not looked at this legislation. I actually came from the securities industry before coming to Congress and we constantly weighed in on what the SEC was doing, and also the IRS. The Service in coming out with new rules that impacted how we conducted our business, not so much in a punitive way, but just in setting guidelines, which I believe are in some respects very important to having a safe and sound practice.

I am curious what your thoughts are on that legislation.

Mr. ROBERTS. Well, the SEC has not yet formed an opinion on the regulatory moratorium legislation. I know that there has been some movement on that bill in the House. Personally, I am concerned that a regulatory moratorium, depending on how it is drafted, stops all rules, good and bad, and, as you know, being regulated at one time yourself, some rules you want to see promulgated. I would prefer the implementation of a more qualitative sifting mechanism that would allow good rules to go forward but would stop bad rules. It is very easy to discuss this in concept; but difficult to implement.

Again, my personal concern with the legislative regulatory moratorium is that it strikes me as a clumsy vehicle, and deals with the problem with a meat cleaver rather than with a scalpel. Such a legislative approach will probably cause unintended problems as you indicated.

Chairwoman MEYERS. I wonder if I could interrupt, because we are going to have to go vote, and I would like to thank the panel very much. I am sorry that we didn't get to spend more time with you. When we are interrupted by three votes, it just gives us a problem.

I have some questions I would like to ask that I am not going to be able to and will submit them in writing. I think that they will kind of go to the heart of how can we improve this legislation from your point of view? Are we making it too much more burdensome?

We have heard comments about indirect effects and about the 30-day notice prior to rulemaking. Anything that you would like to

comment on in terms of this legislation, we would like to hear about it from your particular agency's point of view.

[The information may be found in the appendix.]

Chairwoman MEYERS. I thank you all very much for being with us today.

Mr. WHITE. Thank you.

Mr. SPOTILA. Thank you.

[Whereupon, at 12:20 p.m., the committee was adjourned, subject to the call of the chair.]

APPENDIX

OPENING STATEMENT OF REP. BENTSEN

BEFORE SMALL BUSINESS COMMITTEE

REGARDING

THE REGULATORY FLEXIBILITY ACT

I WANT TO THANK CHAIRWOMAN MEYERS FOR HOLDING THIS HEARING AND THANK THE PANELIST FOR COMING OUT TO GIVE THEIR VIEWS ON THE RFA AND HOW EACH AGENCY IS COMPLYING WITH THIS LAW.

DURING THE PAST 25 YEARS, THE U.S. HAS BEEN THROUGH SEVERAL CYCLES OF REGULATION AND DEREGULATION. ALTHOUGH THERE IS SUBSTANTIAL VARIATION AMONG INDIVIDUAL GOVERNMENT AGENCIES, REGULATION HAS IMPOSED SUBSTANTIAL COST ON THE U.S. ECONOMY, PARTICULARLY TO THE SMALL BUSINESS SEGMENT.

I believe THERE ARE RIGHT AND WRONG REASONS TO REGULATE AND GOOD AND BAD WAYS OF REGULATING. IT SEEMS THAT FEDERAL AGENCIES. ARE USING MORE WRONG REASONS AND BAD WAYS OF REGULATING, AND SOMETHING MUST BE DONE TO ELIMINATE THE PROBLEM.

ONE INCIDENT STANDS OUT IN MY MIND. IT INVOLVES A TRUCKING MAINTENANCE AND LEASING COMPANY LOCATED IN MY CONGRESSIONAL DISTRICT. THIS COMPANY PURCHASED $6000 WORTH OF EQUIPMENT FOR HANDLING A PARTICULAR TYPE OF REFRINGENT THAT EPA REQUIRED THEM TO USE.

NEARLY THREE YEARS AFTER PURCHASING THIS EQUIPMENT, AND GETTING HIS EMPLOYEES TRAINED ON THE EQUIPMENT, THE EPA RENDERED THE REFRIGERANT OBSOLETE. THE COST OF THE EQUIPMENT AND TRAINING WAS WASTED.

THIS IS THE TYPE OF OCCURRENCE THAT FRUSTRATES ME AND MANY MEMBERS OF THIS COMMITTEE. I KNOW THAT $6000 IS NOT MUCH TO SOME PEOPLE, BUT FOR SMALL BUSINESSES, IT IS A TREMENDOUS COST.

Opening Statement of
The Honorable John J. LaFalce
Ranking Minority Member
Committee on Small Business
Hearing on Amending the Regulatory Flexibility Act
February 10, 1995

Thank you, Chairman Meyers, for calling this hearing today as a follow-up to the January 23, 1995, hearing on amendments to the Regulatory Flexibility Act.

As you will recall, with one exception, all of the witnesses at that first hearing were small business owners and representatives of small business organizations. The exception was Mr. Jere Glover, Chief Counsel for Advocacy at the Small Business Administration, whom you called as a witness at my request.

While hearing the views and testimony of the small business community is an essential part of the process of crafting changes to strengthen the Regulatory Flexibility Act -- a law whose intent is, after all, to ease the regulatory burden for small businesses -- input from others also directly affected by the RFA is equally necessary. Today's distinguished witnesses will fill that gap in the testimony as they represent the agencies that write the very rulemaking process that is under review.

I would also like to make once again a point I raised during the January hearing on reg flex concerning section 4003 of H.R. 9, which would expand coverage of the RFA to larger businesses. I want to reiterate my view that such a change would go against the original intent of the RFA, which is to deal with the special needs and concerns of small businesses. I know that other Democrats on this Committee also oppose this language and, indeed, that our Chairman, Mrs. Meyers, has agreed that the benefits of the RFA should be restricted to small business. I would hope that all members of this Committee share that view and that, because of this Committee's special expertise and jurisdiction on small business issues, our recommendation prevails as H.R. 9 goes through the hearing and mark-up process.

Thank you, Madam Chairman.

STATEMENT OF
REP. JAN MEYERS (R-KS)
CHAIR
COMMITTEE ON SMALL BUSINESS

FEBRUARY 10, 1995

"Amending the Regulatory Flexibility Act --
Past Performance and the Need for Meaningful Reform"

Today's hearing is the second hearing we are having concerning the Regulatory Flexibility Act (RFA or Act). While our hearing last month focused primarily on current legislation designed to strengthen the Act, this morning's hearing is designed more to provide the Committee with some needed historical perspective on how the RFA has worked or not worked in practice.

From our review of the annual reports of the Office of Advocacy concerning implementation of the Act, it is all too apparent that some agencies have consistently observed the letter and spirit of the RFA while others have completely ignored it. There are also agencies which have shown improvement in their understanding of and compliance with the Regulatory Flexibility Act, and for that they should be commended. We are here today to hear from representatives of agencies with varying degrees of compliance so that we can get a better idea of how we should approach current proposals to amend the RFA.

As for the proposed amendments to the Act contained in H.R. 9, we have with us today a witness that was presented to us by the Administration on a "take it or leave it" basis. While I am happy to have Mr. Spotila with us today to present the Administration's views, I would have preferred to hear from someone from the Office of Information and Regulatory Affairs at OMB or from someone from the Justice Department, however my staff was informed by representatives from the White House that no one was available from OMB and that no one at the Justice Department was qualified to serve as a witness on the issue of amendments to the RFA. While I find that second proposition difficult to believe, I will be glad to raise it at a later time when representatives of the Justice Department seek to place overly restrictive limitations on judicial review for the RFA. As Members of this Committee involved in this issue over the years know, it has been representatives of the Justice Department who have been the most adamant opponents of judicial review of agency compliance with the RFA.

Our first panel today consists of the two individuals who have spent the most time trying to get federal regulatory agencies to comply with the RFA. They are the current Chief Counsel for Advocacy, Jere Glover, and the Reagan Administration's Chief Counsel for Advocacy, Frank Swain. Between these two gentlemen there is approximately ten years of experience in attempting to fully implement the RFA. Following the testimony of Messrs. Glover and Swain we will hear from our "Administration witness" and from representatives from numerous federal agencies who are prepared to discuss their respective agency's history of compliance with the Regulatory Flexibility Act.

STATEMENT OF JOSEPH A. DEAR
ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH
BEFORE THE
SMALL BUSINESS COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

February 10, 1995

Chairwoman Meyers and Members of the Committee:

The Department of Labor welcomes the opportunity to discuss with the Committee the Department's experience with the Regulatory Flexibility Act of 1980 (RFA), ways to enhance the effectiveness of the RFA, and provisions of Title VI of the Job Creation and Wage Enhancement Act (H.R. 9). I will present information on regulatory flexibility efforts at the Occupational Safety and Health Administration (OSHA) as well as at other DOL agencies that are subject to the requirements of the Regulatory Flexibility Act when promulgating regulations. These agencies include the Employment Standards Administration (ESA), which is responsible for administering and enforcing minimum wage and overtime standards, and anti-discrimination and workers compensation programs; the Mine Safety and Health Administration (MSHA), which is responsible for ensuring the health and safety of our nation's miners; the Employment Training Administration (ETA) which, is responsible for employment service, job training and unemployment insurance programs; the Occupational Safety and Health Administration (OSHA), which is responsible for ensuring the safety and health of the nation's working men and women; and, the Pension and Welfare Benefits Administration, which is

responsible for protecting participants in private pension and welfare benefit plans, including employer sponsored health plans.

The Department of Labor shares the Committee's concern about the special needs of small businesses in complying with federal regulations. Our activities in this regard include providing technical assistance through publications and public appearances, educational materials, and on-site guidance such as nearly 24,000 free consultation visits in 1994 alone that focused on workplace safety and health. We realize that unless employers understand and are able to implement these rules, they serve no purpose. The Department is not interested in simply promulgating rules, but in taking actions that genuinely improve the nation's workplaces and the lives of hard-working men and women who are striving to contribute to society and to support themselves and their families.

The Regulatory Flexibility Act was enacted to help alleviate the burden of federal regulations on small employers. It was designed to ensure that regulatory agencies carefully weigh the effects of proposed and final rules on small entities.

While the Department has regularly undertaken regulatory flexibility analyses, there is room for improvement in the way we deal with the concerns of the small business community. In fact, we are already making progress and during the last two years,

several of OSHA's regulatory initiatives have included regulatory flexibility analyses of high quality. The Department of Labor is determined to make additional progress in analyzing rules to determine their effect on small firms and proposing alternatives to mitigate any disproportionate impacts identified.

In OSHA's 1989 revision of the final rule for occupational exposure to lead, we analyzed the impact of the rule on small firms in each of nine sectors, identified differences in technology, cost of compliance, and economic impact for these firms. We specifically identified that small non-ferrous foundries would be subject to severe economic impacts by the rule. As a result, OSHA explored the feasibility of the rule for these facilities further, and in 1990, issued a final rule granting them regulatory relief in the form of increased flexibility in the methods of compliance.

The Department of Labor's agencies comply with the RFA by: (1) describing the reasons for the regulatory action; (2) stating the objectives and legal basis for the rule; (3) estimating the number of small entities affected; (4) estimating the cost of compliance for small entities, including the cost of reporting, recordkeeping, and obtaining any professional skills needed to comply; and, (5) identifying existing federal rules that may duplicate, overlap or conflict with the rule. If this analysis demonstrated a significant economic impact on a substantial

number of small entities, our agencies considered regulatory alternatives that would serve to minimize this impact on these small firms.

Several examples drawn from OSHA's experience will illustrate how several of our more recent rules have been modified to meet the unique needs of small employers. First, OSHA standard for emergency evacuation plans (29 CFR 1910.38) provides special relief for small businesses in the form of an exemption from the requirement to have a written evacuation plan for firms with ten or fewer employees. Instead, these small employers are allowed merely to tell their workers verbally how to get out in an emergency. A second example applies to OSHA's rule for small grain elevators with storage capacities of less than one million bushels (29 CFR 1910.272). These facilities are allowed to perform a daily visual inspection of grain dust accumulations instead of using physical monitoring equipment like motion detectors.

As we examine the potential impact of our rules on small firms, however, we cannot forget that a safe and healthful work environment is just as important for employees working in small firms as they are for those working in large firms. In the area of occupational safety and health, for example, workplace injuries, illnesses and deaths are not confined to certain industrial sectors or to firms of certain sizes. Fatalities

occur in small workplaces as well as the larger ones. In fact, according to data collected by OSHA, businesses with fewer than ten workers account for 40 percent of all fatalities even though they make up only 15 percent of employment. Data collected by MSHA show that 25 percent of fatalities in the coal mining industry in 1994 were at small mines (where fewer than 20 persons are employed). Small mines make up only 14 percent of coal mine employment.

Thus, while small businesses often seek exemption from protective regulations, their employees unfortunately have no such exemption from workplace tragedies. Just last week, an employee of a small 20-employee wood framing contract firm in Sioux Falls, South Dakota, lost his life. The worker was installing roof decking on a project and slipped off the roof and fell over 30 feet to the ground. The firm had failed to use any fall protection measures to prevent such an accident.

A similar tragedy occurred at a 24-employee recycling firm in Sheffield, Alabama on January 19. While removing scrap for recycling, a 28-year old man was struck and killed by a piece of metal. On January 24th, another worker operating a pulpwood loader, the sole employee of a small logging firm in Lineville, Alabama, was struck by the machine's boom and crushed to death against the loader.

I believe it is important to highlight the need for strong workplace safety and health standards and additional voluntary compliance assistance programs that can help prevent such tragic accidents. OSHA balances the need to develop protective regulations with the legal requirements set forth in our statute as well as other laws like the Regulatory Flexibility Act.

I want to take a moment to discuss some of the Department's newest initiatives to improve the regulatory process. These include outreach efforts to ensure that small employers understand our rules and how to comply with them. During the last two years we have focused on promulgating rules that are clear, cost-efficient and based on sound regulatory principles. Special efforts have also been made to ensure active participation in OSHA's rulemakings by all interested stakeholders, including small employers.

Just this year, we at OSHA put together a new strategy aimed at building a set of modern workplace safety and health standards, developed through partnerships with stakeholders, which make "real sense to real people." This planning process invited stakeholders to participate, both in writing and by attending scoping meetings, to discuss hazards that OSHA should consider addressing in the future.

The Department's agencies are also committed to writing

regulations in plain English and providing employers with tools that will help them understand the rules and comply with them. We know these efforts are particularly beneficial to small employers.

OSHA's 1992 standard to protect workers from exposure to cadmium, for example, prevents occupational-related kidney disease and cancer. In direct response to requests from employers and medical professionals, OSHA developed an interactive software program, in cooperation with the Cadmium Council, to help them analyze workers' lab test results. The software classifies employees based on their test results and also recommends corrective action to be taken by the employer. The software allows the user the option of creating useful supporting documents, such as the required letters to affected workers and helpful checklists. This interactive compliance assistance tool is available free of charge and has been distributed both by OSHA and by the Cadmium Council.

So far, more than 500 copies of this software have been downloaded from the Department of Labor's electronic bulletin board and many other copies have been retrieved from various Internet sites. OSHA strongly encourages users to copy and share the program. A Department of Commerce report to Congress stated that the program is "...expected to save private firms hundreds of thousands of dollars in annual compliance and administrative

costs and conceivably millions in liability and litigation costs." OSHA is developing a similar tool for our asbestos standard and will coordinate this effort with the Building Owners and Managers Association and other interested trade associations.

For other rules, such as our standard for process safety management of highly hazardous chemicals, OSHA worked extensively with industry groups to prepare and participate in five major town meetings held around the country. The Chemical Manufacturers Association (CMA), Organization Resources Counselors, Inc. (ORC), American Petroleum Institute (API), Synthetic Organic Chemical Manufacturers Association (SOCMA), and National Petroleum Refiners Association (NPRA) sponsored these meetings and invited OSHA's active participation. The two-day symposiums were attended by more than 2,000 participants and provided detailed information and training about the rule and how to comply. These partnerships with industry are excellent ways for OSHA to extend its reach and provide assistance to all employers.

MSHA held a Small Mine Summit in April 1994 to bring together miners, operators, government and academia to discuss the unique health and safety problems and needs of small mining operations. The conference generated many recommendations which MSHA is actively pursuing. For example, one effort to help small coal mine operators comply with MSHA rules was the development

and distribution of the small mine operator safety kit. This kit sent free of charge to all small coal mine operators includes accident prevention materials and pocket size laminated cards which remind operators of MSHA's requirements.

Looking toward the 21st century, OSHA is actively exploring ways to use computer technology to provide assistance to employers. This includes placing the text of rules on the Department's electronic bulletin board and Internet sites; expanding the information available on our CD-ROM; and developing interactive compliance tools and flowcharts. All of these efforts are aimed at making workplace safety and health information readily available to businesses of all sizes, whether they access this information from their desktop or their local library.

Writing a reasonable regulation, even one tailored to the needs and capabilities of small businesses, is not enough. OSHA has numerous programs designed to reach small employers and provide them the information and assistance they need to make their workplaces safer and more healthful. The OSHA Consultation Program offers onsite, expert assistance to small employers to help them comply with OSHA requirements and establish effective safety and health programs. The Consultation Program is OSHA-funded and operates in all fifty states. Highly skilled OSHA consultants provide, free of charge, advice to employers on how

to identify and abate workplace hazards, training of employers and their employees on safety and health issues, and assistance in developing and implementing comprehensive safety and health programs. Priority is given to small firms in high-hazard businesses. In 1994, the OSHA consultation program provided assistance to more than 23,700 employers.

This year we are preparing to focus our efforts even more on employers with high injury rates or serious health problems who are willing to establish a program to reduce those injuries and health exposures. We will evaluate state projects on their impact in these areas.

Similarly, OSHA's Safety and Health Achievement Recognition Program (SHARP) is designed to provide additional incentives to small, high-hazard employers to correct all hazards and establish an effective safety and health program. Those who do so through OSHA's Consultation Program, may be rewarded for their exemplary efforts by receiving a special certificate of recognition from OSHA that also exempts them for one year from general schedule OSHA inspections. We are exploring a longer period of exemption for employers who have sustained success for more than one year. During 1994, more than 1,400 establishments were involved in this program representing a 20 percent increase from 1993.

Every year, OSHA provides grants to non-profit groups under

our Targeted Training Grants Program. This program is intended to develop training programs that focus on the special needs of small employers and their workers. In FY 1994, OSHA awarded nearly $2.4 million in grants to 17 non-profit organizations. These grantees will be developing model training programs for ergonomics, logging, process safety management, and safety and health programs.

In recent years, the demand for courses at OSHA's Training Institute in Des Plaines, Illinois, has increased beyond the capabilities of the Institute. In order to extend our reach to employers and safety and health professionals, we have agreements with eight educational institutions to teach OSHA-designed courses. These colleges and universities are located around the country from Manchester, New Hampshire, to La Jolla, California. Just two months ago, we invited educational institutions in the Midwest and West to apply to join our family of training centers. These newest centers will be announced in May.

Thank you for the opportunity to discuss this important issue with the Committee. I would be happy to answer any questions you may have.

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

Testimony of

Jere W. Glover

Chief Counsel for Advocacy

United States Small Business Administration

Before the

Committee on Small Business

of the

House of Representatives

February 10, 1995

Good morning, Chairwoman Meyers and members of the Committee: It is a pleasure to appear before the Committee on Small Business.[1] The issue before the Committee this morning -- amending the Regulatory Flexibility Act (RFA) is a subject of paramount interest to me. As you know, the Act charges the Chief Counsel with monitoring agency compliance with the RFA. While I have sought ways to improve agency understanding and compliance with the Act, amendments must be made to ensure agencies comply with the requirements to analyze the impact on small entities.

Support for strengthening the RFA comes from various sources. President Clinton has long supported judicial review of the RFA, and the Vice President's National Performance Review endorsed judicial review early in the administration. Our current Administrator, Philip Lader was the Chief of White House Policy for that process. Erskine Bowles, former Administrator and now Deputy Chief of Staff also supported this initiative. The President reiterated his commitment to judicial review in a letter to Senator Malcolm Wallop in the closing days of the last Congress. The initiative also has support from a bipartisan majority of Congress. The 1995 White House Conference on Small Business process is well underway and a number of the state conferences have raised amending the RFA as a method for achieving meaningful regulatory reform and reducing the burdens on small entities.

---

[1] My testimony this afternoon reflects the independent views of the Chief Counsel for Advocacy and may or may not be the views of the Administration.

The question facing both Congress and the executive branch is how do we minimize these regulatory burdens, provide the underpinnings of vibrant economic growth, and still protect the public from imminent threats to health and safety.

As a preliminary matter, I believe it is critical that the executive branch and the legislative branch work together to solve this problem. Regulations are often imposed as a result of legislation. For example, the Clean Air Act Amendments of 1990[2] and the Cable Consumer Protection and Competition Act of 1992 (Cable Act)[3] both require federal agencies to develop a sheaf of regulations. If Congress passes less burdensome laws to meets its goals and agencies are committed to adopt simplified regulations, small business will feel real regulatory relief. When legislation is pending, agencies should be pushed hard during legislative debate to give the real cost of the legislation and implementing regulations on small business.

To say that the problem rests solely on the shoulders of Congress would be untrue. No doubt exists that federal regulators also need to do a better job of developing sensible regulation and tailoring those rules to both the size of the problem and the size of the enterprise. Regulators must understand that a one-

---

[2] The Clean Air Act Amendments were passed by a bipartisan vote of both chambers and signed into law by President Bush.

[3] The Cable Act was enacted into law over the veto of President Bush by a wide bipartisan margin.

dimensional approach to a multi-dimensional world is inappropriate. Congress recognized early on that regulations do not have the same impact on small and large businesses. The best vehicle for recognizing these distinctions is the RFA and better compliance with the Act by all federal agencies will provide substantive assistance in relieving regulatory burdens on small business.

Rational government decisions must be based on sound data filtered through a close analysis of potential alternative actions. The President, in his Executive Order 12,866 (as did predecessors Presidents Reagan and Bush), understands the need for increased analysis before regulating. The National Performance Review (NPR), President Clinton's effort to streamline government, recommended that compliance with the RFA be strengthened by permitting judicial review of agency determinations under the Act. The President, in a letter to former Senator Wallop, expressed his support for adding a judicial review provision to the RFA.

Having the Administrator of SBA on the National Economic Council with cabinet level status has allowed the voice of small business to be heard. Erskine Bowles' and Phil Lader's strong voices supporting judicial review for the Regulatory Flexibility Act, were essential in winning the President's strong support for this initiative.

I. The Rational Decisionmaking Process and the RFA

As you are aware, the Administrative Procedure Act (APA) prohibits an agency from taking actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law...." 5 U.S.C. § 706(2)(A). The courts have interpreted this mandate as requiring an agency to adopt rational rules.

Rational rulemaking presumes that an agency has identified a problem that needs correction.[4] It then accumulates information to determine the severity of the problem and potential corrective actions. After due consideration of various alternatives, the agency publishes a notice in the FEDERAL REGISTER requesting comments from interested parties. The agency considers the comments and issues a final rule responding to the comments and explaining why it took the action that it did.

Congress, in enacting the RFA, mandated that agencies add one further consideration to this process -- the impact of proposed solutions on small entities, including, but not limited to, small

---

[4] For purposes of this discussion, I assume that the agency has the statutory authority to correct the problem but has no specific mandate to address the particular problem. In the case of a specific mandate from Congress (or in rare circumstances the courts), the process outlined will be the same except the legislation will have identified the problem to be corrected.

business.[5] The RFA is based on two premises: 1) that federal agencies often do not recognize the impact that their rules will have on small businesses; and 2) that small entities are disproportionately disadvantaged by federal regulations compared to their larger counterparts. Thus, rational rulemaking pursuant to the APA must be executed through the filter of the RFA. It is the job of the Office of Advocacy to monitor, improve and report to Congress on agency compliance.

II. Update on Advocacy Activities

The Office of Advocacy just released its Annual Report on the Implementation of the Regulatory Flexibility Act. That report provides an excellent summary of problems related to compliance with the RFA. Despite the difficulties outlined in the report, the Office of Advocacy has been aggressive in attempting to obtain improved agency compliance with the RFA.

A. The Letters of Exchange

First and foremost, the Office of Advocacy exchanged letters with the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) (copies of which are attached). These letters commit the Office of Advocacy to provide guidance to

---

[5] As the Committee is aware, regulations often impose burdens on small governmental jurisdictions.

agencies in complying with the RFA and raise concerns to the agency and OIRA. They also commit OIRA to provide us with draft proposed rules upon our request before they are published in the FEDERAL REGISTER and referee any disputes between the Office of Advocacy and the agencies. Sally Katzen, Director of OIRA, has personally intervened in several rulemakings and should be commended for her eagerness in cooperating to enforce the RFA.

The letters of exchange arose from OIRA and Advocacy's response to a recommendation from the General Accounting Office to have the two offices work more closely. More importantly, these letters recognize that the Office of Advocacy can be a valuable ally in OMB's efforts to further rationalize agency rulemaking procedures.

Nevertheless, the letters of exchange are not a comprehensive solution to the problem. OIRA's regulatory oversight does not extend to independent regulatory agencies, such as the Federal Communications Commission or the Federal Trade Commission.[6] Nor does OIRA have authority to oversee the regulatory actions of the Agricultural Marketing Service with respect to the implementation

---

[6] The Paperwork Reduction Act empowers OIRA to review requests for information collections from all agencies including independent regulatory agencies. However, the independent regulatory agencies can override an OIRA disapproval of an information collection -- something executive branch agencies cannot.

of marketing orders.[7] Finally, OIRA's actions under the letters of exchange are voluntary and subsequent heads of OIRA and Advocacy need not abide by the letters of exchange.

More importantly, while Advocacy and OIRA hold sway over regulators, the APA places the final responsibility for deciding regulatory issues in the hands of federal judges. Judicial review of the RFA merely extends this principle to rules requiring small business analysis.

B. Use of Advocacy's Amicus Authority

Section 612 of the RFA authorizes the Chief Counsel to file amicus briefs in court when another party challenges an agency regulation. It appears that, in appropriate circumstances, even the threat of filing an amicus brief radically alters an agency's consideration of small business problems.

The Office of Advocacy has been involved intimately in the Federal Communications Commission's (FCC) implementation of the Cable Act. At an early stage, the Office of Advocacy recognized the severe impact that the rules would have on small cable operators, most of whom were not the genesis of problems that led

---

[7] Appropriations riders enacted for the past ten years have prevented OIRA from expending any monies on oversight of implementation of marketing orders. The Office of Advocacy believes that this rider should be eliminated and OIRA have the authority to exercise its proper oversight of the program.

to reregulation of the industry. Extensive comments filed by the Office of Advocacy concerning the burdens on small operators were dismissed by the FCC.

In 1994, the Commission finalized its rules on rate regulation. An association of small cable operators intervened in the litigation contesting the validity of the regulations, and in particular, compliance with the RFA and the Small Business Act. I saw this as an opportunity to test the roiling waters of § 612 and filed a notice of intent to file an amicus with the United States Court of Appeals for the District of Columbia Circuit. After the Commission learned of our intention to file an amicus brief, the Commission led by its General Counsel and head of the Cable Services Bureau, began earnest negotiations with the Office of Advocacy to arrive at a solution to the concerns we raised. After much negotiation, the Office of Advocacy and the Commission developed a satisfactory resolution to our concerns and we agreed not to file the brief.

Our interaction with the National Marine Fisheries Service (NMFS) demonstrates that threats to file an amicus brief, even of a non-imminent variety, can force an agency to improve its compliance with the RFA.

As you may be aware, the North Atlantic fishery, particularly in the Georges Bank, is heavily overfished. NMFS regulates fishing

in accordance with the Magnuson Fishery Conservation and Management Act. NMFS recognized that overutilization of the North Atlantic fishery was endangering the long-term viability of the fishery and proposed stringent measures to reduce overfishing.

The Office of Advocacy, after discussion with a variety of affected entities, wrote NMFS requesting that it examine alternatives which may be less burdensome. A follow-up letter was drafted in which the Office of Advocacy criticized the Service for failure to respond to our previous filings and threatened to intervene in litigation[8] contesting the implementation of the Service's plan to deal with overfishing.

The response, as one might expect, was predictable. The number two lawyer at NMFS requested a meeting with the Office of Advocacy. Staff in the General Counsel's office of the Department of Commerce also contacted us. The Office of Advocacy had detailed discussions which led to modifications in the manner in which NMFS complies with the RFA. In addition, the Office of Advocacy now has an open channel with Commerce Department and NMFS staff to discuss RFA compliance.

---

[8] The litigation was withdrawn because it became moot due to subsequent and further rapid deterioration of the North Atlantic fishery.

The threat of intervention in litigation, while having both shock value and excellent results, is not a general anodyne to agency compliance with the RFA. The Office of Advocacy does not have the resources to intervene in every circumstance in which an agency did not comply with the RFA. Nor would that be an effective strategy with overuse. At some point, agencies would simply tell the Office of Advocacy to go ahead and file and that the agencies do not care.

III. Recalcitrant Agencies

A number of federal agencies have historically been less than cooperative in our efforts to obtain compliance with the RFA. This is not an exhaustive discussion. In fact, many agencies, with respect to particular rules, do not, in our estimation, fully comply with the RFA. Yet, the same agencies in other rulemaking activities do fully comply. Thus, it would be impossible to state unequivocally that an agency such as the

Department of Interior or the Environmental Protection Agency[9] does or does not comply with the RFA.

Such scorekeeping dramatically misses the point in any event. The purpose of the RFA is to force agencies to recognize the impact of their rules on small entities in every rulemaking. An agency can be obsessive about compliance with the RFA for almost all of its rules. However, if it fails to comply with the RFA in promulgating a regulation that has dramatic impact on small business, then its failure more than outweighs its successful implementation in most of the other cases.

The recalcitrant agencies discussed in this section do not miss the boat on compliance with some regulations. They cannot even find the ocean. These agencies place in stark relief the obstinacy that can be developed to avoid compliance with the RFA.

---

[9] For example, the Office of Advocacy has effectively worked with the Environmental Protection Agency (EPA) to obtain meaningful relief in some but not all instances. The Office of Advocacy effectively used arguments based on the RFA to reduce regulatory burdens faced by small quantity generators of hazardous waste and owners of underground storage tanks. The Office of Advocacy also used the principles elucidated in the RFA to get EPA to reconsider its regulations implementing the Emergency Planning and Community Right-to-Know Act. However, there are circumstances in which the Office of Advocacy questions EPA's analysis, such as with respect to effluent guidelines for placer mines, and EPA rejects our suggestions.

An excellent compilation of EPA's record on compliance with the RFA can be found in Microeconomic Applications, Inc., Henry Beale, Robert Burt, and Kathleen Shaver, *Cost-Effective Regulation by EPA and Small Business Impacts* (1992)(SBA Contract No. SBA-4116-OA-89). The report demonstrates that even within one agency different levels of compliance with the RFA are achieved.

A. The Internal Revenue Service

The history of the Internal Revenue Service's (Service) compliance with the RFA has the been the subject of extensive testimony before this committee and has been a "lowlight" of the Chief Counsel's annual report. I will not repastinate those commentaries. Rather, I would like to show why the Service's failure to comply represents such a problem.

The Service proposed regulations that would address perceived abuses by partnerships (Subchapter K entities) in reducing their aggregate tax liability. The proposed rule would apply to all partnerships of which 88% had gross receipts of less than $250,000. The Commissioner proposed to retain the authority to recast any transaction, even one that was valid when completed and complied with the literal language of the Internal Revenue Code, as abusive. Thus, no small partnership would ever have any certainty with respect to future transactions or, more importantly, past transactions.

It is beyond cavil by all parties, other than the Service, that the rule would have a significant economic impact on a substantial number of small entities. Despite this patent effect on small business, the Service did not perform a regulatory flexibility analysis; rather, the Service resorted to its typical

course of considering the regulations as merely interpretative and therefore not within the ambit of the RFA.

B. Procurement Activities

As a general proposition, the APA excludes matters relating to government contracts from the requirements of notice and comment rulemaking. This gap had been used by agencies until 1984 when Congress required that all significant federal contracting regulations be subjected to notice and comment rulemaking. As a result, the major procurement agencies, such as the Department of Defense and the General Services Administration, had to comply with the RFA. Unfortunately their compliance has not been satisfactory. A brief review of current activities will demonstrate the problems facing small business as a result of the failure to fully grasp compliance with the RFA.

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration published a proposed rule to implement various small business provisions of the Federal Acquisition Streamlining Act. The proposed rules would have a significant economic effect on all small businesses wishing to do business with the federal government. Nevertheless, these agencies failed to perform an initial regulatory flexibility analysis because the rules would be beneficial to small business. Nothing in the RFA permits an

agency to avoid its obligations under the Act because the proposals may be beneficial to small business.[10]

In fact, Administrator Lader raised the issue of RFA compliance and the need to cooperate with the Office of Advocacy. As a result of the Administrator's actions, we have been assured of future compliance with the RFA in procurement matters.

C. The Agricultural Marketing Service

Problems with the Agricultural Marketing Service's (AMS) compliance with the RFA has been an issue before Congress on more than one occasion. I wish I could say that Congressional pressure seriously modified the behavior of the AMS. It did not. A fuller explanation of the problems the Office of Advocacy has with AMS can be found in this year's annual report and the Acting Chief Counsel's testimony before this Committee's Administrative Law Subcommittee in 1993. I will not reiterate those remarks. However, I will share one anecdote which demonstrates the serious problems my office faces in trying to obtain compliance with the RFA.[11]

---

[10] A more detailed discussion of this issue can be found in the 1993 Annual Report and to repeat it here in detail is unnecessary.

[11] AMS regulates, by use of marketing orders, the shipment of billions of dollars of milk, fruits, vegetables, and specialty crops. Thus, its failure to comply with the RFA affects a not insubstantial portion of the agricultural markets in the United States.

My office has written to AMS on numerous occasions contesting their implementation of the RFA. My staff has had discussions with various staff members of AMS and submitted a detail memorandum to the Administrator's special assistant concerning AMS compliance. We have had no success until recently and I can now report that discussions have begun with AMS. I am optimistic that the discussions will be productive.

The only way to ensure that each rulemaking from every agency complies with both the letter and spirit of the RFA is to make sure that an agency pays a "penalty" for failing to comply with the RFA. The best mechanism for doing that is through judicial review.

IV. *Rationale Rulemaking and Compliance with the RFA*

The APA presumes that federal agencies will conduct rational rulemaking as described above. However, more frequently than not, agencies predetermine results and utilize notice and comment rulemaking to find a rationale to support that result which the agency has already decided to adopt.

Compliance with the RFA would be a sort of Trojan Horse within an agency's rulemaking citadel. By requiring agencies to measure the costs associated with a particular proposal and identify less burdensome or more beneficial alternatives, the agency is

providing potential critics of the agency's proposal with armament needed to attack the agency's predetermined result.

Thus, compliance with the RFA would require agencies to remain open about potential solutions to given problems as contemplated by the APA. This would, for many agencies, represent a revolution in their decisionmaking process. Since most federal agencies seek to avoid revolutionary change unless imposed by Congress or the judiciary, agencies will likely continue to avoid full compliance with the RFA.

V. *Judicial Review of RFA Decisions*

As you are well aware, an agency's failure to comply with the RFA is not directly contestable in court. Thus, the RFA differs markedly from all other statutes that dictate the process for arriving at agency decisions. This allows federal agencies, as the annual reports have shown, to ignore compliance with the RFA with impunity. The best mechanism is the threat of litigation over agency compliance with the RFA.

As I have demonstrated, the mere potential entrance by the Office of Advocacy in litigation through its amicus authority led the FCC and the NMFS to modify their regulations and procedures for complying with the RFA. A more substantial and ongoing threat, potential judicial review of agency compliance with the RFA,

would certainly lead to scrupulous compliance with the RFA, just as similar attentiveness is paid to the impact statement requirements of the National Environmental Policy Act (NEPA).

Historically, the gravest opponents of judicial review have been federal agencies. Rather than viewing the RFA as a beneficial tool, they find it akin to the albatross that figuratively hung around the neck of the Ancient Mariner. The agencies are concerned that this might lead to a barrage of lawsuits and are concerned that full compliance will slow the process of regulatory development.

Congress enacted the APA to force agencies to draft regulations only after acquiring hard facts or data concerning the problem to be addressed. Failure to acquire these facts or data, which can come to light as a result of performing a regulatory flexibility analysis, should be a telltale sign to the agency that it should stop and reexamine the problem before heading forward with a particular solution. Compliance with the RFA slows down the rulemaking process only where the agency has not done a proper analysis as mandated by the APA and collected the appropriate data needed to analyze various options to the proposed rule.[12]

---

[12] The FCC's implementation of the Cable Act demonstrates the folly of trying to develop a regulatory scheme within a short time frame. However, in that circumstance, the FCC was trying to comply with statutory deadlines issued by Congress. Still it took nearly a year and numerous reconsiderations to finalize rate regulations, at least for large cable operators. Small operator (continued...)

If compliance with the RFA demonstrates that an agency does not have the support needed to implement a particular regulatory initiative -- so be it.

The fears of judicial review are overstated. Unlike NEPA, interlocutory review of agency compliance would not occur because final agency action has not occurred and parties have failed to exhaust their remedies, i.e., bring to the attention of the agency the failure to comply with the RFA. Second, the cost of litigation would be so large that small businesses would use the provision only to contest the most egregious agency actions. Third, given the current method for challenging final rules, most complaints about RFA compliance would be brought as a separate claim in a challenge to agency rulemaking pursuant to the APA. Thus, the number of potential lawsuits challenging agency regulations would be no greater than they are today. What would change is the likelihood of success in court because it is far easier to demonstrate that an agency failed to comply with proper procedures than demonstrate that the solution ultimately chosen by the agency is arbitrary and capricious. Of course agencies could avoid that pitfall through full compliance with the RFA. Thus, judicial review provides agencies with a significant

---

[12](...continued)
rules are still in flux because the FCC has not accumulated the needed data to finalize them. Most small operators function using regulations aimed at large operators.

incentive to comply fully with the RFA -- something they do not have today.

VI. Comments on Regulatory Flexibility Provisions of H.R. 9

One of the questions asked in the invitation letter was my opinion of the Regulatory Flexibility Act Amendments contained in H.R. 9. I believe that the posture I have taken since arriving at the Office of Advocacy has been consistent. I am more committed to judicial review than the exact language of a bill. In that regard, I believe that the provisions in H.R. 9 which are the same as those introduced by Congressman Ewing in 1993 would accomplish the primary objective of obtaining judicial scrutiny. Similarly, I believe that various versions of amendments to the RFA floated by the Administration and others also would achieve that goal.

If the language of H.R. 9 can be improved--fine--but let's get an independent bill passed as soon as possible so that the Office of Advocacy can turn its attention to ensuring that agencies comply with the RFA. However, I am concerned with any provision that may allow large businesses to come within the zone of interest protected by the RFA. We often find that large firms like

government regulations because they raise the barriers to entry and prevent small firms from competing with them.[13]

---

[13] Section 4003 of H.R. 9 extends the requirement to perform a regulatory flexbility analysis, at both the proposed and final rule stages, for "other businesses." In simple terms, it extends the principles of the RFA to all businesses. I believe that this extension is counterproductive to the purposes of the RFA.

The RFA was enacted with the recognition that small businesses face special problems with respect to complying with the federal regulations. Requiring all regulatory flexibility analyses to examine the costs of compliance for all businesses defeats the purposes of the RFA. Section § 4003 eliminates the distinction between large and small business -- a distinction which I believe still validly exists.

In addition, the inclusion of other businesses in § 4003 may allow any business to sue under the RFA not just small businesses. Title VI of H.R. 9 simply eliminates the prohibition on judicial review. Since large entities would be covered by the analytical requirements of the RFA pursuant to § 4003, any entity would be aggrieved by an agency's failure to comply with the RFA not just small entities. Any entity would come within the zone of interests protected by the RFA and would thus be eligible to sue an agency for failure to comply with the RFA. *Compare* Clarke v. Securities Indus. Ass'n, 487 U.S. 388, 399-400 (1987) (outlining the zone of interest test for standing to challenge an agency action).

Little doubt exists that expanding the universe of entities eligible to sue under the RFA would increase the likelihood that federal agencies would comply with the tenets of the Act. However, the ability of large entities to sue could result in shifting costs to small businesses or otherwise impairing their competitive advantage.

Prior to the enactment of the Clean Air Act, which legislatively resolved the dispute, EPA was considering two methods for controlling volatile organic compounds (VOCs) from automobiles. One would require additional components on automobiles and the other would have required modification of pumps by gasoline retailers. If EPA had chosen to require automobile manufacturers to control VOCs and the H.R. 9 version of the RFA had been in effect, the automobile manufacturers could have contested agency compliance with the RFA. The end-result may have been the imposition of that requirement on small businesses -- gasoline service stations. The authors of the RFA did not intend such an anomalous result. I do not believe that

(continued...)

VII. Conclusion

In 1946, Congress took a giant step forward by standardizing the decisionmaking process used by federal agencies. That Congress and subsequent court decisions demanded that agencies exercise their rulemaking authority in a rational manner. In 1980, Congress recognized that the concerns of small entities, the largest segment of the regulated community in terms of sheer number, were being ignored in the rulemaking process. Congress determined that without appropriate consideration of their concerns rational rulemaking could not occur. However, for whatever reason, that Congress decided not to provide the necessary teeth to force federal agencies to take small entity concerns into consideration when promulgating regulations.

I believe that the time is appropriate to take the necessary steps to force such compliance. Jawboning by my office and OIRA and the issuance of executive orders by three Presidents, while sometimes successful, has not guaranteed compliance and certainly do not effectively address the problems posed by independent

---

[13](...continued)
the RFA should be used as a tool by large businesses to increase their competitive advantage over small businesses or shift their costs to small businesses through litigation.

Finally, if Section 4003 is to be enacted it should be modified to require quantification of compliance costs for certifications as well. Otherwise, agencies will simply certify all their rules and wait until court challenges to provide adequate disclosure of costs.

agencies' regulations. Only the threat of judicial scrutiny will ensure that agencies will comply with the letter and spirit of the RFA. Even judicial scrutiny will not resolve all regulatory burdens faced by small business until Congress applies the principles of the RFA when it enacts legislation.

I am pleased to answer any questions the Committee may have.

Statement of Lon Hatamiya, Administrator
Agricultural Marketing Service
United States Department of Agriculture
before the
Committee on Small Business
of the
United States House of Representatives
February 10, 1995

On the Compliance of the Agricultural Marketing Service with the Regulatory Flexibility Act

Madame Chairwoman and Members of the Committee:

Thank you for the opportunity to appear before your Committee to discuss the Regulatory Flexibility Act (RFA). With me today is Ken Vail, from USDA'S Office of General Counsel.

I am here today as the Administrator of the Agricultural Marketing Service (AMS). Before I took this appointment, however, I was a small businessman. I was a farmer, growing walnuts, prunes, almonds, and peaches with my family in northern California. From first-hand experience, I know the problems faced by farmers, and I appreciate the Committee's desire to assist small businesses, including family farmers.

As a small businessman, I certainly support the need to weigh the impact of government regulation on small businesses. To this end, I believe that AMS complies with the RFA. And over the years we have worked with the Small Business Administration's Office of Advocacy to fine tune the process.

AMS prides itself on working effectively with small business. For many of our programs, we simply serve in an oversight role, assisting small businesses to help themselves. Programs such as marketing orders or research and promotion boards are initiated, administered, and terminated by small businesses.

As you know, the RFA requires a regulatory analysis of the impact of proposed and final rules on small entities unless the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. We do not make such determinations lightly. However, in operating a marketing order or other industry marketing program, the affected industry often needs to make periodic minor changes through the regulatory process. Moreover, at least a third of the rulemaking each year actually reduces regulations.

AMS' programs do not originate in Washington, but rather from farmers who see a need for the regulation. These regulations originate with farmers not because of some kind of regulatory analysis grafted onto traditional rulemaking, but because of the authorizing legislation. To explain, I will focus on marketing orders, but my comments apply to our other programs that are requested by the affected industries. Marketing orders are authorized by the Agricultural Marketing Agreement Act of 1937 (AMAA) and make available to farmers a wide variety of marketing tools, if the farmers choose to act. As a family farmer who has operated a small business under marketing orders, I know personally the benefits that these programs offer through the orderly marketing of milk, fruits, vegetables, and specialty

crops. Marketing orders are important to farmers like me who produce a high-quality product, but have little individual influence on their markets, a circumstance not uncommon to small businesses. And these programs benefit small growers. For milk marketing orders, the average size of the 92,000 dairy farms covered is a herd of 75 cows, and the average acreage farms under the fruit and vegetable marketing orders is approximately 54 acres.

Through marketing orders, small businesses actually request to be regulated. Farmers tailor a program to meet their marketing needs. A program is designed through a formal rulemaking process, including a hearing and other opportunities for industry and public input. Ultimately, a referendum is held to determine if two-thirds of the affected small businesses support the program. If these same growers decide later that the program does not facilitate the marketing of their products, they can call for another referendum to determine whether the program should continue.

Local control does not end when the order begins. For fruit, vegetable, and specialty crop marketing orders, local committees of farmers and handlers administer the order. These committees are made up of neighbors like mine in California, not far-off government officials. USDA's role is limited to ensuring that the committees comply with the law, and that all voices are heard. As market conditions and market structure change, it is often the case that a variety of fine tuning in necessary. These changes are addressed through rulemaking. In addition to the small business perspective that inherently characterizes the local administrative committees, AMS has specifically directed that they ensure full consideration of small

business impact in their deliberations.

Why would committees of small businessmen take an action that would substantially injure themselves and their industry? As intelligent business owners, they would not, and to suggest otherwise is the type of paternalistic, "Washington knows best" attitude that this Administration and I believe this Committee opposes. While no one questions whether a local Chamber of Commerce hears from local merchants, when local farmers establish and administer marketing orders, some question whether they can look out for their own and their neighbor's interests. Even in the unusual circumstance in which a committee pursues actions that burden fellow farmers, those farmers always have the opportunity to call for a vote to terminate the order. In fact, farmers have chosen to terminate several orders over the years, as California plum growers did in 1991. And, if the Department becomes convinced that an industry is seriously divided on the administration of a marketing order, the Secretary retains the right to terminate it, as Secretary Espy did with the citrus marketing orders in California and Arizona.

In closing, I note that Congress intended the RFA to require agencies to solicit the ideas of small businesses. At AMS, we do that everyday, actually carrying out the will of farmers.

Thank you for inviting me here; I would be happy to answer any questions you might have.

Statement of Stephen H. Kaplan
General Counsel of Department of Transportation
Before the Committee on Small Business of the
United States House of Representatives
Friday, February 10, 1995

My name is Stephen H. Kaplan, and I am the General Counsel of the Department of Transportation (DOT). I am pleased to have the opportunity today to tell you about the special efforts we have made to respond to the concerns and needs of small businesses and other small entities affected by our rulemaking.

First, I should note that DOT has, by some measures, the largest rulemaking responsibility in the federal government. Our nine operating administrations and the Office of the Secretary have a tremendous responsibility for a broad range of matters that include safety and the environment.

We take very seriously our responsibilities under the Regulatory Flexibility Act and believe that we have done a very good job in developing rules that minimize, to the extent possible, the burdens those rules impose on small businesses. Indeed, we often do more than the Act requires. For example, we generally apply its requirements earlier than required, using it at such stages as the advance notice of proposed rulemaking (ANPRM). It is also important to note that, in implementing our rules, we stress compliance rather than penalties. We would rather deter than detect. Moreover, because we are primarily regulating safety, it is important to the economic

viability of those we regulate that they act in a safe manner. I have attached to my statement a description, including many specific examples, of a wide range of things we have done in response to concerns of small entities. (Attachment 1)

We recognize that small businesses may be concerned with some of the rules that we issue, but, in this regard, there are four points that must be stressed: (1) We make every effort to hear and understand their concerns. (2) We seriously consider and try to address those concerns in developing our rules. (3) Our legal responsibilities often do not permit us to grant all the relief small businesses may desire. (4) The rulemaking action we take is often compelled by statutory mandates.

An excellent example of our efforts involves DOT's alcohol and drug testing rulemakings that were mandated by Congress and were issued in February 1994. Although the rulemaking itself is not necessarily typical of DOT rulemakings because of the magnitude and complexity of the effort involved, we believe it is quite illustrative of the concern we have for small business impacts. We issued an ANPRM with a number of options and held numerous public meetings and hearings. The final rule contained a number of actions to alleviate the burdens on small businesses, including:

- exempting some small buisinesses;
- phasing in the rule for others;
- requiring only surveys of most small businesses rather than reports from all;
- permitting the use of easy, short forms.

A more detailed description of our many actions is attached. (Attachment 2)

Department of Transportation
Small Business/Entity
Success Stories

1. Early and Continuous Stakeholder Involvement

The Department of Transportation (DOT) already has taken extensive action is this area. It makes wide use of such things as advance notices of proposed rulemaking (ANPRM), requests for information, public meetings, advisory committees, and routine meetings with industry.

One excellent example of this is the FAA's use of the Aviation Rulemaking Advisory Committee (ARAC), which provides the FAA with extensive technical and economic information on numerous issues of importance to small aviation entities. ARAC has over 60 association members covering the complete spectrum of aviation interests. The committee is responsible for reviewing a wide range of aviation issues and making recommendations to the FAA before it makes a decision on a proposed rule. The Aviation Rulemaking Advisory Committee makes its recommendations to the FAA, when appropriate, in the form of fully developed draft regulatory documents, with industry and FAA participation from day one. The FAA has assigned over 50 important regulatory and policy issues to ARAC for its consideration.

2. More Effective Communications

We are increasing the opportunity for better participation. For example, the Department is in the process of creating an electronic docket. We are also exploring the possibility of increased use of telecommunications to provide easier and better access for people who cannot make it to our public hearing or meetings. We are also increasing our use of informal public meetings where there will be more two-way discussion rather than testimony.

3. Informal Public Meetings

We try to have more informal meetings with the public to permit an easier exchange of information. For example, in implementing statutory mandates for airline passenger facility charges and for alcohol testing of transportation employees, the Department held public meetings very early in the process (prior to issuing NPRMs) to discuss with interested members of the public specific issues raised by the legislation. The Office of the Secretary (OST) just held a public meeting with those interested in commercial space transportation matters to discuss potential issues involved in licensing and insurance rulemakings before issuing NPRMs.

We also make special efforts to make our hearings more accessible to small business. For example, we have held evening hearings; one example is the FAA hearings on current proposals concerning its "high density" rule. We

some parts of the Department." Those suggestions include such things as using more weekend and evening hearings and improving inspectors' understanding of small businesses and their problems. The list is at Attachment 3.

I have also asked that the operating Administrations examine the benefits of developing a seminar for us to conduct for small businesses that would explain the rulemaking process and how they can make better use of it (e.g., how to obtain a change to or exemption from an existing rule).

I hope you agree that we at DOT are making special efforts to address the concerns of small businesses and, where possible, to alleviate the burdens they might often face. We believe these cooperative efforts, these attempts to more effectively involve small businesses in our rulemaking process, are more likely to achieve success than the adversarial approach of increasing litigation.

Thank you for the opportunity to express the Department's views on this important subject.

also have made Departmental employees available an hour before hearings began so that members of the public can ask questions of them about the proposal before giving their testimony.

The Coast Guard often holds regional hearings in locations convenient to concentrations of affected entities. For example, seven public meetings were held following publication of proposed revisions to the small passenger vessel regulations. Meetings were held in New England, the Mid-Atlantic, the Gulf Coast, the Northwest, the California, the Great Lakes, and the Inland Mississippi areas.

Coast Guard Auxiliary training courses, which include information on compliance with recreational boating regulations, are often held on weekends and at night. The Chicago hearing on the Small Passenger Vessel rulemaking was held on a Saturday.

NHTSA has demonstrated a willingness to meet at times outside of regular business hours. The agency frequently meets on weekends with national organizations, especially those affiliated with law enforcement agencies. The law enforcement meetings usually cover a broad range of traffic-related topics, including seat belt and helmet use, driving under the influence of alcohol, and speeding. NHTSA takes these opportunities to participate in workshops relating to programmatic issues and also to present current issues and updates.

4. Teleconferences

We are trying to use teleconferencing more to improve access to DOT. For example, Coast Guard held closed circuit video/telephone hearings on a Tug Escort rulemaking. Live hearings were held in Anchorage and Valdez with remote sites in Cordova, Seldovia, Homer, Kenai, Seward, Kodiak, Whittier, and Ninilchik.

As another example, after we issued our drug testing rules in 1988, we held a teleconference in which the audience could call in questions. The Coast Guard used closed circuit video and telephone conferences at a number of locations in Alaska during the Tug Escort rulemaking.

In September 1994, the NHTSA Child Passenger Safety Interactive Satellite Seminar linked 42 local interactive classroom locations, thereby allowing the active participation of 1,200 attendees. Using advanced satellite and computer technology, participants could interact with the presenters and other locations. Participants were able to respond to questions and provide immediate feedback and evaluation by using the keypads provided at their seats. Several thousand additional people were able to watch the proceedings from non-interactive sites.

5. Q& A Format

The Department makes active and effective use of the question and answer format in its regulatory documents. For example, USCG used this approach in its Tug Escort rulemaking, Towing Vessel Safety initiative, and Oil Spill Response Vessel rulemaking. RSPA used it for its Emergency Flow Restricting Devices and Safeguarding Food rulemakings. NHTSA has done this recently for rulemakings involving CNG-Power Heavy Trucks and Buses, Uniform Tire Quality Grading Standards, and Permitting Replaceable Lens Headlamps. In the preambles to its NPRM's, the FAA often asks specific questions to elicit information to support its economic evaluation of the proposed rule. In a recent NPRM proposing duty time rules for flight attendants, the agency asked whether flight attendants should be given the option of following the pilot rules.

6. Negotiated Rulemaking

DOT was the first Federal agency to use negotiated rulemaking, has used it a number of times since, and has just started another one on an FRA rulemaking on worker safety. We are currently considering using it to develop a USCG operating schedule for drawbridges within the city of Chicago, a NHTSA rulemaking on headlamp aiming procedures, and an FHWA rule on incorporating physical fitness determinations as part of the Commercial Drivers Licensing process. It is also worth noting, with respect to earlier public participation, that NHTSA first issued a notice requesting public suggestions of suitable topics for negotiated rulemaking before making its selection. While not formally negotiated rulemaking, the FAA Aviation Rulemaking Advisory Committee has used a consensus process to develop recommended regulations that will be widely accepted in the aviation community.

7. Electronic Docket and Bulletin Boards

The Department is in the process of setting up an electronic docket for its rulemaking and adjudicatory files. Hard copies of information submitted to the docket will be passed through a scanning machine and stored electronically. The public will be able to review the docket through their own computers or in a DOT electronic reading room. Eventually, the public will also be able to submit documents to the docket electronically. As a result, when the Department issues a proposed rule it will immediately be placed in the docket and be available to the public electronically and the public will be able to submit comments, electronically if they desire.

In addition, in a number of instances throughout the Department we have conducted individual rulemakings with the aid of electronic bulletin boards. For example, the Department just used this approach for a proposal concerning procedural rules for airport rates and charges decisions. Coast Guard regulatory information is currently posted on the Society of Naval and

register for one year after the accident. We also recently proposed to ease requirements imposed on small businesses applying for disadvantaged business certification; the proposal would permit the submission of one application per state for certification even when multiple recipients of DOT financial assistance are involved.

Despite efforts like these, we recognize there is always room for further improvement. In 1994, that is why we were active participants in the Small Business Forum on Regulatory Reform. That is also why we continue to take steps that should lead to even better rulemaking. For example, we are currently making a dramatic change to our public rulemaking (and adjudicatory) dockets. We are creating an electronic docket that will store all of our rulemaking dockets electronically, using imaging techniques that will store even handwritten postcards. Ultimately, we will permit electronic submission of comments as well as electronic retrieval. This system will provide small businesses with a tremendous advantage over the current system: For example, a small business in California will be able to more effectively participate in our rulemaking by being able to read our docket at its office or other computer.

In January, I also sent a memorandum to senior officials throughout the Department asking them to continue our efforts to address the concerns of small business "and find areas where we can do even more." In that regard, I provided them with seventeen "suggestions on how we can make our rules (and their enforcement) even more responsive to the concerns of small businesses. Many of these approaches are already being used in

There are many other examples of our accomplishments. For example, we phase in some of our requirements, such as the NHTSA requirement for automatic occupant protection. To implement the private motor carrier passenger rule, FHWA allowed a one-year educational period to inform a segment of the bus industry never before regulated; these rules applied some of the requirements covering commercial motor vehicle operators to private persons carrying passengers for their own purposes (e.g., church groups or scouting organizations). The FAA used a phased compliance schedule for Stage 2 aircraft noise rules that made it easier for small business to comply with the phase-out of noiser aircraft.

We also try to "tier" our rules, where appropriate. For example, a number of Coast Guard regulations are keyed to vessel size or number of passengers carried. USCG's requirements for overfill devices to prevent oil spills is an illustration of this; after hearing public comment, USCG did not cover vessels below a certain size, eliminating 21 tankships and 391 tank barges owned and operated by small companies. In the private motor carrier passenger rule, FHWA tailored the requirements for the private carriers compared to the commercial operators; for example, they imposed fewer paperwork requirements.

In addition, we use simplified forms or reporting where possible. For example, FHWA recently issued a rule that eliminated the requirement for all motor carriers to submit an accident report within 30 days after they learned or should have learned of a reportable accident. Instead of the reports, carriers are now simply required to maintain an accident

Marine Engineers (SNAME) bulletin board and on the MARAD bulletin board. Coast Guard will establish its own bulletin board in the near future, and will include regulatory information. FHWA places copies of laws and regulations applicable to its programs on the Federal Highway Electronic Bulletin Board System (FEBBS). RSPA has established a bullet board called the Hazardous Materials Information Exchange (HMIX) that provides regulatory information on its hazardous materials program.

8. Public Comment on Agency Regulatory Procedures

The Department sought public comment on this subject in the past when it adopted its "Regulatory Policies and Procedures." We are also seeking public comment on specific actions we are considering in response to the executive order and the National Performance Review. For example, the Federal Aviation Administration (FAA) recently asked for public comment on and held a public hearing on its approach to cost-benefit analyses. The FAA is also requesting public comment on the use of direct final rulemaking. The Coast Guard held a public meeting and solicited comment as part of a Total Quality Management review of its regulatory process. It has implemented a number of procedural changes as a result of the review.

9. Electronically Available Newsletters.

As an example of this, USCG publishes an Oil Pollution Act of 1990 Newsletter. It is currently available on the Society of Naval and Marine Engineers (SNAME) and MARAD Bulletin Boards, and will be available on a Coast Guard Bulletin Board to be established in early 1995.

10. Toll-Free Hotlines

To the extent that resources permit and we believe they would be helpful, the Department has already developed and publicized a large number of toll-free hotlines. For example, FHWA provides and publicizes a toll-free 800 number to handle inquiries of all types 24 hours per day. FHWA recently published and widely circulated a booklet containing a list of telephone numbers (including SBA) of particular usefulness to truck and bus drivers. This included the numbers for all our division offices, which serve as local sources to answer questions and/or direct calls to appropriate agencies.

11. Guidance Material

DOT publishes a large amount of guidance materials. For example, DOT publishes information on hazardous materials that includes lists of toll-free numbers, contacts, laws, and regulations. The FAA has an extensive system of Advisory Circulars that inform the public of acceptable means of complying with FAA regulations.

As another example, FHWA and its State partners make available to all motor carrier operators educational and technical assistance packages that explain the motor carrier safety and hazardous materials regulatory requirements and how to comply. These packages are distributed during face to face contact with the carrier official by a field safety specialist.

An excellent example of the kind of material FHWA puts out for small businesses, which was extremely effective (over 300,000 copies were distributed), is the overview prepared for its alcohol and drug rules that were issued in February 1994. FRA has a similar program designed to inform small railroads of regulatory requirements and assist them in their compliance efforts.

We also provide a lot of guidance in easy-to-use Q&A formats. One example involves the FHWA, which began using the question and answer format in 1992, and uses it exclusively to address incoming interpretation requests from the motor carrier industry. In November 1993, the FHWA published more than 500 Q&As in the Federal Register to assist the industry in understanding the rules. The FHWA intends to periodically update this rule in the Federal Register and make such a publication in the Federal Register annually. The FAA is now publishing its interpretations of its noise rules in Q & A format in the Federal Register.

After issuing our initial drug testing rules in 1988, the Department developed and presented a series of conferences held throughout the country. We gave two days worth of presentations on how to comply with our rules and answered many questions from the audience. We took all of the frequently asked questions and prepared a publication that contains those questions along with the answers. The FAA used the "Dear Abby" format to develop its guide, "Most Frequently Asked Questions About Drug Testing." FAA's magazine, "FAA Aviation News," uses a Q & A format to respond to questions from the public on FAA regulations.

12. Dissemination of Information

We make special efforts to disseminate information widely, especially to small businesses. For example, when applicable, FHWA supplies plainly written news releases and/or personalized communications to small business trade organizations for their own distribution and sends them to the many specialized trade magazines and newsletters aimed at those audiences. In addition, FHWA supplies radio "actualities" for general broadcast and tapes and interviews to approximately 20 radio stations throughout the country known as late-night "trucker talk shows" when it has news of particular import. The Coast Guard maintains a number of mailing lists that include trade and other specialized publications and organizations. Extended comment periods are used when it may take more time to disseminate information to fragmented groups, such as recreational boaters or the fishing industry. The FAA disseminates airworthiness

directives on the "Fed World" bulletin board of the Department of Commerce.

13. Briefings

We often brief stakeholders and trade associations upon promulgation of significant final regulations. Again, a good example are the recently issued drug and alcohol rulemakings where we not only held briefings for stakeholders and trade associations on the day the rules were announced but also held a series of four public conferences throughout the country to discuss the rules in more detail. Agency representatives have also spoken at hundreds of conferences held by private organizations.

14. Staff Understanding of Small Businesses

Through training courses, circulation of various documents (e.g., the reports developed by the committees set up by the Small Business Forum on Regulatory Reform and other steps) we improve the understanding of relevant agency staff about small businesses. An excellent example of our efforts in this area is the action taken by FHWA. Its field staff is particularly close to small operators, visiting their facilities and conversing with them by telephone on a regular basis. Headquarters staff, some of whom came from the industry, also visit carrier offices, truck stops, driver and industry meetings, truck shows, and the like to meet and talk with small operators. Small operators are represented on FHWA's National Motor Carrier Advisory Committee and are always among those invited to serve on various ad hoc committees and working groups when special occasions arise.

Because of the nature of our rulemaking, which is generally quite industry specific, our inspectors generally have a very good understanding of the companies with which they deal. For example, the FAA's aviation safety inspectors receive training in the differences between the smaller operations and the larger. Further, many of the inspectors were either employees or owners of small aviation businesses before being hired by the FAA, and therefore have personal knowledge about them.

15 Alternative Enforcement Mechanisms

Our general approach to compliance is to first take steps to help industry understand and comply with our rules. However, our primary responsibility involves safety regulations, and there comes a time when we must go beyond "encouraging" and take enforcement action to deter noncompliance and help ensure safety. An example of our efforts to be non-punitive involves FHWA compliance reviews. During these reviews, investigators review records and also educate the carrier in areas of deficiencies. For several years, FHWA has distributed folders of information designed to help carriers obtain satisfactory safety ratings. These folders are currently being updated and will be available to all motor carriers. They are particularly

helpful to smaller businesses that do not have the resources to retain a professional consultant.

In addition, FHWA staff ranging from regional personnel to safety investigators regularly attend industry and trade association safety meetings. Many division offices sponsor safety meetings that specifically target small motor carriers. Where FHWA personnel sponsor or attend the meetings, they distribute handouts with information about the regulations and they answer audience questions.

The Coast Guard is considering initiatives to place increased emphasis on self-inspection, with Coast Guard oversight and spot checks. Additionally, unless there is evidence of a pattern of noncompliance, penalties are rarely imposed for minor violations that are quickly corrected.

The FAA's enforcement policies call for using counseling warning letters, and corrective actions to the extent that safety does not require resort to civil penalties or certificate actions. For minor violations that are quickly corrected, penalties are rarely used. Further, the FAA has programs that encourage self-evaluation, disclosure, and correction of any deficiencies found. The FAA's Reporting and Correction Policy provides that, under most circumstances, if a company self-discloses a violation, corrects the condition immediately, and takes steps to prevent it from recurring, a reduced penalty or no penalty will be imposed. FRA also exercises discretion in deciding whether to use its enforcement tools, and tries to direct its enforcement actions toward the more serious violations. RSPA is using mediation in its hazardous material enforcement cases.

In some instances, we also provide reasonable grace periods, where appropriate. As noted above, for example, when the FAA discovers a non-compliant condition, it frequently will accept a corrective action plan in lieu of a penalty. In each case, the FAA inspector considers how much time should reasonably be given to correct the condition. However, if our inspectors observe a violation they generally must report it, and action must be taken promptly to avoid endangering the public. If it is not too serious, we may only send a warning letter rather than assess a penalty. Also, some safety discrepancies may require immediate correction, and the vessel/vehicle/airplane may be prohibited from operating. This is different from a "penalty" for the violation.

16. Phase-ins

When appropriate, we gradually phase-in new regulatory requirements in an effort to promote greater fairness in the enforcement rules. For example, when the National Highway Traffic Safety Administration required airbags or automatic belts in automobiles, it phased in the requirement over three years, requiring an increase in the percentage of new cars that had to have the equipment each year. When we issued the alcohol and drug testing rules for the Department, we provided small businesses with an extra year

before they had to began implementing the testing requirements. When we issued the initial drug-testing rules, we phased in the random testing rate, allowing industry to start with a lower rate while they gained experience implementing the rule. To accommodate the private motor carrier passenger final rule, FHWA allowed for a one-year educational period to educate and inform a segment of the bus industry never before regulated. This consisted of a mass mailing of brochures to the bus population informing them of the new regulations. In implementing the Stage 2 aircraft noise legislation, the FAA adopted a phased compliance schedule that offers two methods of compliance at each of three compliance dates, and has a separate phased schedule for new entrant air carriers. The FAA also amended the flight data recorder rules to eliminate a single compliance date and granted an exemption to allow a phased compliance schedule for operators eliminating older airplanes that are costly to upgrade.

17. Tiering

Where appropriate, we use tiered structures. For example, in our alcohol and drug regulations, we generally require reports from all large companies but only do surveys of the small companies. A number of Coast Guard regulations are keyed to vessel size or numbers of passengers carried. Certain of FRA's reporting requirements exclude railroads with fewer than 400,000 employeer hours. FRA's event recorder rule applies only to trains operated above 30 miles per hour, which excludes most small railroads. FRA's engineer certification requirements contain staggered dates for implementation based on railroad size.

18. Uniform Enforcement

We endeavor to insure uniform enforcement activity, including enforcement activity delegated to the states. For example, RSPA works through the Cooperative Hazardous Materials Enforcement Development (COHMED) Program, a State/Federal organization devoted to the consistent enforcement of hazardous materials laws and regulations.

NHTSA attempts to ensure uniform enforcement activities in the traffic law arena. The agency has developed model enforcement programs in many areas, including seat belt enforcement, standardized field sobriety testing, detection of impaired drivers, the drug recognition and evaluation program, and speed limit enforcement.

Consistency in enforcement actions is an important element of the FAA's compliance and enforcement program. Actions by field offices are reviewed by the regions to this end. The FAA has a sanction table that provides the normal range of penalties for various violations, as well as guidance on circumstances where warning letters and corrective action should be used instead of penalties. In the most significant cases, the action must be

coordinated with headquarters, largely to ensure consistency with national policy.

19. Interagency Coordination

We have an extensive amount of interagency coordination. For example, our drug and alcohol rulemakings were coordinated with HHS, DOE, NRC, and FDA. Our automobile fuel economy regulations are coordinated with DOE. Our regulations requiring accessibility for the disabled are coordinated with the DOJ and the Architectural and Transportation Barriers and Compliance Board. Our infectious substance rulemakings are coordinated with agencies like the Center for Disease Control and OHSA. Before issuing regulations concerning the carriage of preference cargoes, MARAD always advises other Federal agencies impacted by the rulemaking, namely, USDA, USAD and DOD. We worked with EPA in developing the hazardous waste manifest rule.

20. Electronic Data Interchange

We allow quite a bit of electronic data interchange. For example, RSPA allows the electronic filling of certain airline tariff information. The FHWA has recently awarded a contract to investigate and develop methods for updating carrier information in the Motor Carrier Management Information System (MCMIS). One of the methods being explored is allowing carriers electronic access to the MCMIS to update their information. This will only be possible and feasible if the carrier has the proper software and hardware required. This action, if implemented, would also reduce the paperwork burden on the motor carrier industry. A current Coast Guard rulemaking will permit electronic submission of merchant vessel personnel information. FTA has begun a Grants Management Information System that is available to a limited number of grantees and will be made available to all other grantees in the future. FTA is also moving to electronic grant making.

21. Simplified Forms and Reporting

To the extent possible, we use simplified forms and reporting requirements for small businesses. For example, for our drug and alcohol testing reporting requirements we have a short "EZ" form. Another example involves FHWA which, effective March 4, 1993, issued a Final Rule that eliminated the requirement for all motor carriers to submit an accident report within 30 days after they learned or should have learned that a reportable accident occurred. The motor carrier was required to file the original and two copies of Form MCS 50-T (property) or Form MCS 50-B (passengers) with the Director of the Regional Motor Carrier Office of the Federal Highway Administration region in which the carrier's principal place of business was located. Instead of submitting reports, carriers are now required to maintain an accident register of accidents meeting the definition of an accident for a period of one year after an accident occurs. This action has reduced the paperwork burden on the motor carrier industry.

22. Work with State Agencies

One excellent example of our efforts to work with states involves FHWA's work with the Commercial Vehicle Safety Alliance (CVSA), which is an organization of State and Provincial Government Agencies and representatives from private industry in the United States and Canada dedicated to improvement of commercial vehicle safety. In addition to jointly establishing the uniform driver/vehicle inspection standards and out-of-service criteria used by States in conducting roadside and terminal inspections in the Motor Carrier Safety Assistance Program (MCSAP), the CVSA and FHWA together produce "The Guardian." "The Guardian" is a newsletter whose articles concentrate on regulations, policies, procedures, and personalities involved in the MCSAP. The newsletter is distributed to, among others, FHWA personnel nationwide and to all State agencies participating in the MCSAP. The FHWA is also directly linked by the LAN e-mail system to the CVSA and many State agencies.

The FHWA is committed to continue working with the States to further enhance the level of coordination and uniformity. For example, FHWA is working with the States in the implementation of a national uniform commercial vehicle accident reporting program through the adoption of the National Governors Association accident data elements. Concurrently, it is assisting States to develop the appropriate communication and coordination networks with all interested groups to make certain that the information that is collected and reported is accurate and complete. Many of its program initiatives designed to improve uniformity and coordination, as well as meet its primary goal to reduce the number and severity of commercial motor vehicle accidents, are conducted in partnership with CVSA, the American Association of Motor Vehicle Administrators (AAMVA), industry groups and other Federal agencies. These initiatives include automation of accident collection and reporting procedures, creation of program evaluation procedures, development of multi-year State Enforcement Plans (SEPs), creation of "Peer Groups" to develop recommendations on how to improve coordination and facilitate the exchange of ideas on how to better administer the MCSAP, and creation of a uniform compliance and enforcement program along the U.S.-Mexico border consistent with the NAFTA provisions.

RSPA works with COHMI as noted above. RSPA also works closely with state agencies both directly and through the National Association of Pipeline Safety Representatives. In addition, RSPA is designating an employee in each region as a state liaison.

We believe that we already have very good relationships with the federal, state, and local agencies affected by our regulations. For example, the agency within DOT that has the greatest relationship with state and local governments is the Federal Highway Administration (FHWA). FHWA is an active participant in meetings of the American Association of State Highway Transportation Officials. The Coast Guard works closely with the National

Association of State Boating Law Administrators (NASBLA) to review and develop recreational boating regulations. FTA also works closely with States and localities; two organizations it works closely with that represent transit providers (which in most instances are local public bodies) are the American Public Transit Association and the Community Transportation Association of America.

DOT Drug and Alcohol Rulemakings

In 1988, because of its concern about the potential impact of drug use in the transportation industry, the Department issued drug testing requirements affecting six different transportation modes. In response to requests that DOT should explore additional steps with respect to alcohol also, in 1989, we also published an advance notice of proposed rulemaking to obtain public comment on whether we should take additional action with regard to alcohol. The ANPRM set forth a number of options and raised a large number of questions. Before we could take further action in this rulemaking, Congress passed the Omnibus Transportation Employee Testing Act of 1991, which mandated drug and alcohol testing for four transportation modes.

After enactment of the Act, to enable better evaluation and comparison of the capabilities of different alcohol testing methods, the Department conducted a public hearing in November 1991 to obtain specific information from the manufacturers of breath test devices. In December 1992 the Department published a number of proposed rulemaking documents primarily aimed at implementing the statutory mandate. In addition to requesting written comments, the Department held four public hearings in Washington, DC; Chicago; San Francisco; and Dallas. We also held a public meeting in Washington, DC, to facilitate presentation and discussion of relevant information on one of the issues raised in the rulemaking, work place random testing and its impact on drug use

deterrence. At that meeting over 20 participants presented papers and sparked discussions on a variety of issues.

All of this action took place before we issued the final rules in February of last year. It illustrates the numerous steps we take to ensure effective public participation in our rulemaking process. The substantive action we took in the rules also illustrates our consideration of small business concerns. The following list of steps that we took show that we tried to provide as much flexibility as possible to small business covered by our statutorily mandated alcohol testing requirements:

1. Small companies can comply in a variety of ways - testing can be conducted by the employer, an outside contractor or program administrator, a consortium, a union, or any other entity.

2. Small businesses will have an extra year to implement the alcohol testing requirements. The extra year will enable small businesses to join established consortia or large employer testing programs, rather than have to establish their own programs. The use of consortia is the predominant method of compliance with the DOT drug testing rules in some industries, particularly among smaller employers.

3. We have eased the requirements to join consortia. A small employer may better achieve the benefits of a lower random rate (if industry achieves this lower rate under the performance standard) if it joins a consortium.

4. In some transportation industries, a significant percentage of employees are subject to the testing rules of more than one modal administration. This is one reason we have tried to make the modal administration rules as uniform as possible. Where it does not compromise the effectiveness of the testing program, one mode will defer to another. This should ease compliance for small employers.

5. Pre-employment testing is a statutory requirement from which we could not exempt small employers. However, allowing the use of recent test results from previous employers in lieu of new pre-employment tests should also ease compliance for small employers.

6. The Research and Special Programs Administration is exempting master meter operators and liquefied petroleum gas operators; these are generally small businesses.

7. All but one of the operating administrations are limiting the reporting requirements for small businesses. They will survey the small companies, not require them all to report.

8. The Federal Railroad Administration (FRA) is retaining the exemption in its existing drug and alcohol rules for railroads with 15 or fewer employees that do not engage in joint operations. (These entities are not considered sufficiently safety-sensitive to be subject to testing because they tend to operate on private track at slow speeds.) FRA, which requires covered employers to submit plans for their alcohol misuse programs, imposes significantly reduced plan requirements on smaller employers.

9. The testing procedures final rule provides flexibility to use different testing technologies for screening tests. This flexibility should assist small employers in keeping down their costs of equipment purchases.

10. If there are no positive test results, the employer may use an easy, short form to record the results.

In addition, when we issued our new alcohol and drug testing requirements, we prepared and distributed a special pamphlet providing a plain English overview of the requirements that were especially directed at small entities. Hundreds of thousands of copies of the document have been distributed. Upon announcing the rule, we also held briefings for industry and employee representatives and Congressional members and staff. Then we held a series of four conferences throughout the United States to provide assistance and guidance to those who must comply with the regulations. Approximately two thousand people attended the four conferences. The Department has also put together a tremendous amount of guidance material for regulated entities on such issues as model training courses for the breath alcohol technicians who will have to conduct testing.

DOT Suggestions

on

How to be More Responsive to Small Business Concerns

1. Make more use of advance notices of proposed rulemaking, requests for information, public meetings, advisory committees, and routine meetings with industry to gather information before making specific rulemaking proposals.

2. Hold more evening and weekend hearings or meetings.

3. Use teleconferencing more frequently to make public hearings and meetings more accessible.

4. Use question formats more frequently to obtain needed information; use question and answer formats more frequently to provide information.

5. Make Departmental employees more readily available to answer questions about rulemaking matters; e.g. have employees available an hour before the start of a hearing to answer questions.

6. Make more use of electronic communications and toll-free hotlines to make information available to the public or provide responses to inquiries.

7. Increase efforts to ensure that staff is fully aware of the special problems faced by small businesses.

8. Reexamine our communications strategies for advising small businesses of important action or information, including our list of organizations and individuals to be contacted.

9. Consider additional use of briefings, seminars, and workshops for stakeholders, trade associations, etc. after issuing significant final rules.

10. Continue to ensure that all important notices and information directives affecting small business are published in the Federal Register.

11. Increase efforts to make the public aware of the information that we make available to them (e.g., guidance material and training courses).

12. Improve inspectors' understanding about the small businesses they are inspecting and the particular problems small businesses face.

13. When appropriate, consider use of grace periods and phase-ins, or the use of tiered regulations, to ease the burden imposed on small businesses.

14. Increase our efforts to lessen paperwork burdens by considering such options as short forms, surveys rather than reports from an entire industry, and the use of electronic filing.

15. When appropriate, increase efforts to develop non-punitive methods of ensuring regulatory compliance.

16. Provide the regulated community with a list of the kinds of violations and common errors encountered by the agency; e.g., DOT publishes an annual report on hazardous materials civil penalty cases, which provides information on the types of violations found and the civil penalties assessed; we also issue letters to industries advising of typical violations that are observed during hazardous materials inspections and publish penalty schedules and guidelines.

17. Recognize that, despite our best efforts, our actions in response to small business concerns are not always fully appreciated; increase your efforts to change this perception.

TESTIMONY OF

RICHARD Y. ROBERTS, COMMISSIONER
U.S. SECURITIES AND EXCHANGE COMMISSION

CONCERNING THE

REGULATORY FLEXIBILITY ACT PROVISIONS OF H.R. 9,
THE JOB CREATION AND WAGE ENHANCEMENT ACT OF 1995

BEFORE THE

COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 10, 1995

I appreciate this opportunity to testify, on behalf of the Securities and Exchange Commission ("SEC"), regarding the SEC's experience with the Regulatory Flexibility Act and regarding the provisions in H.R. 9 that would amend the Act.

The SEC is the agency responsible for protecting investors from securities fraud and other violations of the federal securities laws. The SEC is also charged, however, with reducing the cost of securities regulation for small business, particularly for small businesses attempting to raise capital.1/ The SEC is also required, like other federal agencies, to consider under the Regulatory Flexibility Act the effects of proposed rules on small businesses and other small entities.

The SEC has long recognized that small business is critical to the nation's economy and that capital is critical to small business. The SEC is committed, to the extent consistent with

---

1/ See 15 U.S.C. §§ 77s(c)(2), 80c-1 (1988).

investor protection, to reducing costs and burdens in the federal securities rules for small businesses. We view this as not merely consistent with the Regulatory Flexibility Act, but as part of our basic task under the federal securities laws: to protect investors with the least possible interference with capital formation and the securities markets.

Not long after the Regulatory Flexibility Act was passed, the SEC reviewed the federal securities laws to consider their effects on small entities. The Chief Counsel for Advocacy of the Small Business Administration ("Chief Counsel"), in its first report regarding the Act, said that the SEC's review "epitomizes the initiative that all agencies should be taking in the area."2/

As required by Sections 603 and 604 of the Regulatory Flexibility Act, the SEC attempts to assess the effects of proposed rules on small entities and to consider less burdensome regulatory alternatives. As required by Section 609, the SEC attempts to ensure that small entities learn about proposed rules likely to affect them. And, as required by Section 610, the SEC periodically reviews its current rules and considers whether they should be revised.3/

2/ Oversight of Regulatory Flexibility Act: Hearings Before the Subcomm. on Export Opportunities and Special Small Business Problems of the House Comm. on Small Business, 97th Cong., 1st Sess. 51 (1981) (statement of Frank Swain, Chief Counsel for Advocacy, Small Business Administration).

3/ See Securities Act Release No. 7112, 59 Fed. Reg. 61843 (Dec. 2, 1994); Securities Act Release No. 7039, 58 Fed. Reg. 68578 (Dec. 28, 1993).

The SEC's efforts to simplify the securities laws and rules, though, are not limited to what is required by the Regulatory Flexibility Act. The SEC organizes two annual conferences that address the effect of securities laws and rules on small businesses: a government-business forum on small business capital formation, and a conference of federal and state securities regulators. We have an Office of Small Business Policy to focus on issues of concern to small business. And, perhaps most tangibly, the SEC recently revised its rules to make it easier for small businesses to raise capital.4/ Specifically:

- The SEC amended Rule 504 to allow non-reporting companies to raise up to $1 million annually from the public; the only federal requirements applicable to such offerings are a brief notice and the antifraud provisions.
- The SEC amended Regulation A, a registration exemption often used by small businesses to sell their securities, to increase the amount that may be raised from $1.5 to $5 million. The amount offered under this simplified procedure has increased from about $40 million in the year before the amendment to more than $290 million in 1994.
- The SEC simplified and expanded the availability of its special Securities Act registration forms for "small

---

4/ See Small Business Initiatives, Securities Act Release No. 6949, 57 Fed. Reg. 36442 (Aug. 13, 1992); Additional Small Business Initiatives, Securities Act Release No. 6996, 58 Fed. Reg. 26509 (May 4, 1993).

business issuers."5/ Since the new small business forms replaced the old S-18 form, the amount registered using these forms has increased from about $800 million per year to more than $6.3 billion in 1994.6/

- The SEC also adopted a separate, simpler registration and reporting system under the Securities Exchange Act for small business issuers. This integrated system sets forth "plain English" disclosure standards that are geared toward small business issuers.

Although the SEC attempts to comply with the Regulatory Flexibility Act, and more generally to make its rules workable for small entities, there are probably SEC rules that could be made less burdensome for small business without compromising investor protection. But the SEC's doors are open, and we are willing to hear from small businesses about ways in which we could reduce their regulatory burdens. We agree with the statement by the Chief Counsel, in his most recent report, that attitudes may be as important as legislation in this area.7/

5/ "Small business issuers" are generally issuers with revenues of less than $25 million and with public float (market value of voting securities held by non-affiliates) of less than $25 million.

6/ In 1994, there were 33 registrations using these forms for offerings of less than $1 million, 89 registrations for between $1 million and $5 million, 145 registrations for between $5 million and $10 million, and 119 registrations for between $10 and $20 million. Thus, as intended, these forms are being used by small businesses for small offerings.

7/ See U.S. Small Business Administration, Office of the Chief Counsel for Advocacy, Annual Report of the Chief Counsel for

(continued...)

Our specific comments on the Regulatory Flexibility Act provisions of H.R. 9 are as follows.

Section 4003 of H.R. 9 would amend the Regulatory Flexibility Act to require an agency to consider not only effects on small entities, but also on "other businesses and individuals." We question whether it is wise to expand the Regulatory Flexibility Act in this way. The purpose of the Act is to focus agencies on the special problems of small businesses and other small entities. Other laws and policies -- and indeed other provisions in H.R. 9 -- ensure that agencies consider large businesses and individuals. Moreover, Section 4003 would create a curious inconsistency within the Regulatory Flexibility Act: an agency could avoid a regulatory flexibility analysis by certifying that a proposed rule would not have a significant impact on a substantial number of small entities; if an analysis was performed, however, the analysis would have to address not only small entities but large entities and individuals.

Section 6001 of H.R. 9 would allow judicial review of compliance with the Act by repealing Section 611 of the current Act. There is broad support for expanding the availability of judicial review under the Act,8/ including "strong support" from

---

7/(...continued)
Advocacy on Implementation of the Regulatory Flexibility Act, Calendar Year 1993, at 20-21 (1994).

8/ Under the current Act, courts do not review compliance with the Act, but they do consider the regulatory flexibility analysis in determining whether agency action is unreasonable. Thus, even under current law, an agency may not "ignore with impunity the (continued...)

the Administration.9/ However, there is also some disagreement regarding how Congress should create judicial review.

The SEC agrees with the Small Business Administration10/ that, if there is expanded judicial review under the Act, Congress should provide limits on such review. Otherwise, both agencies and small entities will waste time and money developing these limits through litigation. Leaving these issues to be resolved through litigation would be inconsistent with the current efforts to eliminate unproductive, unnecessary litigation.

In general, judicial review of agency compliance with the Regulatory Flexibility Act should occur at the same time and in the same court as judicial review of the related agency rule. Thus, the bill should be explicit that judicial review is not available for initial regulatory flexibility analyses or certifications or ten-year plans. Judicial review at this stage would be inconsistent with general principles regarding the timing of judicial review and would waste time for courts,

---

8/(...continued)
effect of its rules upon small entities." Thompson v. Clark, 741 F.2d 401, 408 (D.C. Cir. 1984); see American Mining Congress v. EPA, 965 F.2d 759, 771-72 (9th Cir. 1992).

9/ Letter from President Bill Clinton to Senator Malcolm Wallop (Oct. 8, 1994).

10/ See Testimony of John T. Spotila, General Counsel, U.S. Small Business Administration, Before the Subcomm. on Commercial & Administrative Law, House Committee on the Judiciary (Feb. 3, 1995).

agencies, and affected parties.11/ The bill should also be explicit that judicial review should occur in the same court in which the agency's rule is or could be reviewed. Parallel proceedings in different courts, one regarding the agency's rule itself and one regarding the Regulatory Flexibility aspects of the agency's rulemaking, would be inefficient. Finally, there should be a reasonably short period within which to file any court action under the Regulatory Flexibility Act. Finality is in the interests not only of agencies, but of all those affected by rules, including small entities.

Section 6002 of H.R. 9 would require an agency to consider indirect as well as direct effects of proposed rules. This seems likely to force agencies into rather speculative attempts to discern the indirect effects of their rules. Again, as with Section 4003, it seems preferable to keep the focus of the Act relatively narrow; agencies should consider the direct effects of their rules on the entities subject to the rules. The difficulty of identifying and estimating "indirect effects" was one reason that the D.C. Circuit, through Judge Bork, interpreted the current Act as not requiring such an analysis. See Mid-Tex Electric Cooperative v. FERC, 773 F.2d 327, 343 (D.C. Cir. 1985).

Section 6003 would require that every proposed agency rule be provided to the Chief Counsel for Advocacy of the Small Business Administration thirty days before publication of the

---

11/ See Abbott Laboratories v. Gardner, 387 U.S. 136, 149-51 (1967).

proposal, so that the Chief Counsel may express his or her views on the proposal.12/ This Section would create an unnecessary delay of at least thirty days between agency action and release of the proposal. Creating a thirty-day period during which the proposed rule is not available to the public, including affected small entities, is inconsistent with the basic purposes of the Administrative Procedure Act and Regulatory Flexibility Act.

Moreover, this thirty-day delay is unnecessary. If Congress wishes to increase the role of the Chief Counsel in agency rulemakings, it could require that agencies transmit all rules to the Chief Counsel when they are published. Congress could then require agencies to respond separately, in any final rule release, to any comments of the Chief Counsel. The Chief Counsel has not, in recent years, commented on any SEC rules, but the SEC would certainly consider such comments seriously.

Section 6004 of H.R. 9 expresses the "sense of Congress" that the Chief Counsel should be permitted to appear as amicus curiae in court cases challenging agency rules. It is unclear what this provision would add to Section 612 of the current Act, which requires federal courts to allow the Chief Counsel to appear as amicus curiae.

12/ The delay would be somewhat shorter if the term "publication" in Section 6003 were interpreted to mean publication in the Federal Register. The SEC's proposed rules, however, are "publicized" in many ways, including print stories and electronic services. Without clear legislative history, it would be difficult to construe "publication" to exclude these other ways in which proposed rules are made public.

In conclusion: the SEC is committed, to the extent consistent with investor protection, to reducing unnecessary costs and burdens for small businesses. The SEC has therefore not found it difficult to comply with the Regulatory Flexibility Act's basic requirement, to consider small business when writing rules. The SEC has concerns, however, as outlined above, regarding some of the specific proposed changes to the Act in H.R. 9.

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

TESTIMONY OF

JOHN T. SPOTILA
GENERAL COUNSEL

UNITED STATES SMALL BUSINESS ADMINISTRATION
BEFORE THE
COMMITTEE ON SMALL BUSINESS
OF THE
HOUSE OF REPRESENTATIVES

FEBRUARY 10, 1995

Good morning, Madam Chairman and members of the Committee. Thank you for inviting me to appear before you on behalf of the Administration to discuss current efforts to comply with and strengthen the Regulatory Flexibility Act (the Reg Flex Act). As you requested, I am joined this morning by senior representatives of the Department of Transportation, OSHA, the Department of Agriculture's Agricultural Marketing Service, and the Department of Commerce's National Marine Fisheries Service. After my consolidated statement on behalf of the Administration, each of these representatives will join me in trying to answer any questions you may have. I ask that my written statement, and their individual written statements as well, be entered into the record.

As a former small business owner, and an attorney representing small business owners for twenty years in New Jersey and Pennsylvania before joining the Small Business Administration as its General Counsel, I have experienced the cumulative burdens imposed upon small business owners by government regulations. I have dealt personally with costly recordkeeping, reporting, and substantive requirements, and know firsthand about paperwork and compliance burdens. Small business owners are creating jobs in this economy. It is vitally important that regulatory agencies consider the impact on small entities of their proposed rules and then minimize adverse effects as much as possible.

For all these reasons, I was very pleased in 1993 when the National Performance Review, under the direction of Vice-President Gore and with substantial involvement from our current SBA Administrator, Philip Lader, strongly endorsed the idea of adding a right of judicial review to the Reg Flex Act. At the specific direction of Erskine Bowles, then our SBA Administrator (and now, of course, Deputy Chief of Staff for the President), I spent a considerable amount of time last year working with others in the Administration to try to implement that recommendation. My good friend, Jere Glover, who serves as SBA's Chief Counsel for Advocacy, and who also is testifying before you today, has been a strong ally and partner in that endeavor. We both very much want to see the prompt passage of a Reg Flex judicial review provision which benefits small entities in three ways: by encouraging better regulations, by affording access to the courts for relief, and by not bogging people down in a lot of unnecessary litigation.

Last October, President Clinton reiterated his personal support for strong judicial review of Reg Flex determinations. He wants a provision which will give meaningful redress to small business owners and other small entities. Today, on his behalf, I reaffirm the Administration's support for this important small business initiative.

As you know, the Reg Flex Act was designed to ensure that federal regulating agencies carefully weigh the effects of their rules on small entities. During the past two years, at the direction of the President and Vice-President, and with the assistance of Sally Katzen, as head of the Office of Information and Regulatory Affairs (OIRA), and of my friend, Jere Glover, as Chief Counsel for Advocacy, federal regulators have improved their compliance with the Reg Flex Act. Real progress has been made. And that progress has occurred in the context of a broad Administration commitment to regulatory reform, with growing sensitivity to the special concerns of the small business community.

As you know, on September 30, 1993, President Clinton issued Executive Order No. 12866, on "Regulatory Planning and Review." In an effort to streamline the regulatory process and reduce unnecessary regulatory burdens, he called upon OIRA and all federal agencies to develop innovative regulatory approaches, encourage meaningful public participation in the regulatory process, consider the cumulative impact of their actions, and engage in better long-range planning.

At the SBA, we took this guidance seriously and immediately began working to try to implement the President's directives. In cooperation with OIRA, we initiated a coordinated interagency effort to identify, recommend and implement regulatory reforms that would be of particular benefit to small business. The

Departments of Labor, Transportation, and Justice, the Food and Drug Administration, the Internal Revenue Service and the Environmental Protection Agency all joined with us in this endeavor from the beginning, with the Food Safety Inspection Service of the Department of Agriculture and the ICC adding their support once we got underway.

At a unique public Forum on March 17, 1993, senior representatives from SBA, OIRA, and the six participating agencies pledged to work together in a serious manner to fulfill the President's goal of meaningful reform. They formed interagency working groups to examine the effects of regulation on five distinct industries: chemicals and metals, restaurants, food processing, trucking, and environmental disposal and recycling services. The IRS formed a sixth working group which focused on tax-related issues affecting all of the designated industries.

Each working group met numerous times over a period of months to consider comments and suggestions from 150 small business owners and their representatives and 80 agency personnel. When the working groups issued their findings in late July, they included some 140 recommendations which now are being evaluated and, in many cases, implemented by the participating agencies. Agencies like EPA, OSHA, and the IRS, which traditionally may not have been well thought of by small business owners, have been particularly cooperative and energetic in expanding their outreach to the small business community and considering suggestions for reform. Joe

Dear, the agency head at OSHA, is here today and I invite you to ask him any questions you may have about his commitment to such reform.

Our experience with this interagency effort has direct relevance to the subject of your hearing today. We found surprising consensus among small business owners from every business sector and every part of the country. They did not tell us that the air is too clean or their workplaces too safe. They did not say that we should stop inspecting meat or making sure that airplanes are safe. They did tell us that they want early and continuous involvement in regulatory development, better access to regulatory information, and an emphasis on compliance assistance rather than harsh enforcement. They want us to eliminate paperwork, streamline forms, and get rid of unjustified regulations. When it comes to the Reg Flex Act, they want the right to seek judicial review of agency decisions, but most of all they want the agencies to do a better job of developing regulations so that they won't have to bother with litigation to protect their interests. Many seem not to trust the agencies at the moment, so they are looking to Reg Flex reform as a way to assure that agencies consider the interests of small business when they make future decisions about regulations.

President Clinton and Vice President Gore are aware of these sentiments and clearly hear what small business owners are saying. Even without legislation to add a right of judicial review, they have directed all of the agencies in their Administration to

comply in good faith with the procedures set forth in the Reg Flex Act. Jere Glover, in his role as the chief Counsel for Advocacy at SBA, and Sally Katzen, as the head of OIRA, have entered into a letter agreement which commits both of them to work together to ensure agency compliance with the Reg Flex Act administratively. Jere and Sally are both convinced of the need to assure full compliance with the Reg Flex Act. By working together, they believe they can help increase the level of agency compliance, so that it becomes less necessary for small business owners even to consider bringing litigation to seek judicial review.

Having mentioned administrative efforts to improve compliance with the Reg Flex Act, and with the realization that we still ought to look at individual agencies to see what we can learn from their Reg Flex experience, I reiterate the President's support for passage of a strong, carefully drafted judicial review provision. Any administrative approach is very dependent on the particular individuals involved and the resources available to them. Individuals come and go. There is a risk that some federal agency in the future might disregard its obligation in this area. The President and Vice President believe, as I do, that the objectives of the Reg Flex Act are too important to be ignored.

The challenge in adding a right to seek judicial review lies in crafting language that will give small entities meaningful relief while not requiring them to spend

a lot of time and money in litigation. Most small business owners want no part of litigation. What they want, instead, are better regulations. In this context, they want a judicial review provision that is clear and complete, encouraging sound regulatory development and giving proper guidance to all concerned so that lawsuits are needed only if and when regulators ignore their Reg Flex obligations.

With these guiding principles in mind, we would like to suggest, respectfully, that the Committee consider the following points in evaluating the Reg Flex provisions of H.R. 9.

(1) The Reg Flex Act properly focuses on protection for small entities. However, Section 4003 of H.R. 9 would require agencies to perform regulatory flexibility analyses for "other businesses" as well. This would change the emphasis of the underlying statute and would force agencies to divert scarce resources that could be better employed in striving to protect small entities. Coupled with its simple removal of any prohibition on the right to seek judicial review, H.R. 9 would extend to large entities the right to initiate litigation, even in situations where small entities are very pleased with the regulatory approach followed by an agency.

(2) Although it may seem appealing to give small entities access to the courts by merely repealing the ban on judicial review now contained within the Reg

Flex Act, this may not be the approach that serves small entities best. We are concerned that small entities would find themselves involved in continuing litigation over the scope, nature and timing of review. This would impose costs upon them which could have been avoided by a more specific judicial review provision. And, while some might agree on where the courts are likely to come out on these issues, in the absence of clear statutory direction there is always the possibility that the courts might be less favorable to small entities than the proponents of judicial review intended. We would suggest to you, again respectfully, that it makes sense to specify a time limit for bringing actions for judicial review. It also makes sense to clarify the standard of review (presumably, the standard now set forth in the Administrative Procedures Act). It makes sense for small entities to realize that courts will be relying on the administrative record and that comments should be filed with the regulatory agency during the rulemaking stage (which, incidentally, also will help the agency issue better rules in the first place and may obviate the need for legislation). The statute should make it clear when, and to what extent, relief can be given if the courts find that an agency has not complied with the Reg Flex Act. In this regard, we would suggest that the courts be given broad power to hold up implementation of a rule or grant other appropriate relief if an agency fails to bring its actions into compliance, but that the courts not be asked to substitute their own judgment for that of the regulating agency as to the substantive nature of a particular rule. Whatever the final resolution of these questions, however, the main point is that the statutory guidance

should be made clear so that small entities, and the agencies, not find themselves embroiled in unnecessary litigation.

(3) The Reg Flex Act properly focuses its attention on the development of final rules by regulating agencies. If small entities are to have the right to bring an action in the courts seeking review of an agency's compliance with the Reg Flex Act, it is entirely appropriate that such actions be limited to the review of certifications or Reg Flex analyses prepared for final rules. It makes very little sense to tie up the courts with litigation over proposed rules or such other matters as 10-year plans or regulatory agendas. Ideally, this point should be clarified in any judicial review provision.

(4) We also believe that it would be a mistake to extend the scope of the Reg Flex Act to an assessment of the "indirect effects" of proposed regulations. The essential problem here is that it is very difficult to assess these effects with any degree of accuracy. Even if regulating agencies proceed in good faith, they may be drawn into litigation because of the ambiguity of the statutory language. Instead of giving small entities meaningful protection by requiring agencies to concentrate on mitigating the direct effects of what they propose to do, we end up diverting attention and encouraging wasteful litigation.

These are some suggestions which we feel warrant careful consideration. The President strongly favors prompt passage of a meaningful Reg Flex judicial review provision. He appreciates how important this proposal is to small business and other small entities. At the same time, we believe the statutory language can and should be improved to meet what I believe are our common objectives, and we would be happy to work with the Congress on this important legislation.

With me today are senior officials from several agencies, all of whom are knowledgeable about the regulation of small businesses and, in particular, about the implementation of the Reg Flex Act within their agencies. I commend the Committee for assembling this distinguished group of witnesses, whose experience demonstrates both how much progress we have made in the regulation of small businesses and how much remains to be done. While each of the witnesses will be available to you for any questions, I would like to offer some general observations about their regulatory activities regarding small business.

As I noted before, Reg Flex is a limited but important aspect of an overall effort to improve and rationalize the regulation of small businesses. Across the federal government, agencies have, over the past two years, made significant efforts to improve every phase of the regulatory process: in the development of regulations, in the dissemination of regulatory information, and in compliance and enforcement.

The efforts of the Department of Transportation (DOT), under the leadership of Secretary Peña and General Counsel Steve Kaplan, who is with us here today, are particularly instructive. In developing regulations, DOT has used a variety of techniques to maximize public participation--particularly by smaller business. Through advanced notices of proposed rulemakings (ANPRMs), informal public meetings held in the evening or on weekends, teleconferences, and negotiated rulemakings, DOT has solicited--and learned from--regulated businesses. In what I consider a healthy bit of competition, DOT is vying to become the first agency to establish an electronic docket, which will enable businesses and individuals to access proposed rules on their own computers and comment on those proposals with a minimum of effort.

DOT has also taken the lead in educating regulated parties about new and existing regulations. Through plain-English letters to trade associations and specialty publications, the Federal Highway Administration (FHWA) and the Coast Guard make certain that small businesses learn about new regulations as quickly as possible. Recognizing that some of its constituents are difficult to reach, FHWA also produces informational programs that are broadcast on late-night "trucker talk shows."

This sort of customer-sensitive innovation carries over into the Department's compliance activities. In dozens of instances, DOT has used a range of techniques--such as tiering, phase-ins, 800-numbers, and short forms--to ensure that small businesses are

provided with the maximum flexibility in complying with new regulations. More intangibly, but perhaps more importantly, DOT's general orientation toward small business is genuinely cooperative. FHWA's field staff, already available to assist clients over the telephone, can often be found at truck shows, carrier offices, and truck stops, answering questions and, what is more important, listening to small businesses.

The Department of Labor has also taken aggressive steps to reach out to small businesses, both in the rulemaking process and in compliance. As Assistant Secretary Dear can explain further, OSHA frequently offers compliance advice and assistance to small businesses. Last year alone, almost 24,000 firms took advantage of this free service. Similarly, through a program called "SHARP," OSHA uses incentives to encourage small firms to correct severe hazards. Last year, more than 1,400 businesses participated in this program.

As this partial listing suggests, Reg Flex is but a part of the Administration's larger effort to improve the regulation of small businesses. Reg Flex helps to ensure that the interests of small business are adequately weighed by all regulatory agencies. In recent years, Reg Flex has led to significant improvements in regulations. For example:

- In reviewing the impact of its lead standards on small businesses, OSHA determined that the standards had a severe economic impact on small non-ferrous foundries. In response, OSHA revised its regulations to provide those firms with extra flexibility in complying with the regulation.

- Similarly, Reg Flex led OSHA to exempt small grain elevators from a requirement that elevators maintain physical monitoring equipment, allowing visual inspections for smaller facilities.

- With regard to the Toxic Release Inventory rules, EPA and the Chief Counsel for Advocacy have been engaged in constructive discussions to minimize the regulatory burden on small businesses without significantly increasing the threats to public health and safety.

- As a final example, the Reg Flex Act influenced DOT's recent regulations regarding drug testing. In consultation with hundreds of small entities, DOT established more convenient and cost-effective compliance measures for small firms,

provided a longer phase-in for those firms, and created limited exemptions that benefits small businesses.

For all of these successes with Reg Flex, we recognize the need for further improvement.

Some of the issues concerning Reg Flex arise from differences of opinion about the applicability of the Act. The Agricultural Marketing Service (AMS), for example, has long treated marketing orders issued pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA) as meeting the requirements of Reg Flex. As Administrator Hatamiya can explain in more detail today, AMS views marketing orders as a form of regulation that small businesses initiate on themselves, rather than a regulation imposed on small businesses.

The vast majority of producers under these orders are small businesses. The average dairy herd within a milk marketing order is 75 cows; the average fruit, vegetable, or specialty crop farm under an order is 54 acres. Marketing orders must be approved by a supermajority (two-thirds) of the relevant producers. Likewise, producers also can terminate an order. Therefore, because producers actually request to be regulated under various marketing orders, AMS traditionally has taken the position that approved orders represent a self-help alternative for the producers.

The National Marine Fisheries Service (NMFS) has adopted an analogous position with regard to fisheries regulations promulgated under the Magnuson Act. As many Members know, most of these regulations are developed by local management councils, consisting of representatives of recreational and commercial fishing interests--most of whom are small businesses. These councils, again through a democratic process, recommend regulations to NMFS. NMFS considers the councils better situated to assess the concerns of small business than NFMS' own analysts.

As noted in several of his reports, the Chief Counsel has a different opinion about the applicability of the Reg Flex Act to marketing orders and fishery management regulations. I am happy to report that, under the auspices of the National Economic Council, the Chief Counsel will meet with each of the agencies to develop a shared understanding of the best application of Reg Flex in these unusual situations.

To me, these cases illustrate a broader lesson, namely that the Regulatory Flexibility Act should itself be applied with some flexibility: not laxity, not carelessness, but rather sensitivity to the regulatory context. If it is the case that marketing orders and fishery management plans are truly examples of regulations requested and driven by small businesses, then mechanical application of the Reg Flex Act could do more harm than good and could lead an agency to substitute its judgment for that of affected small businesses. Being expert in neither fruit nor fish, I am not in a position to resolve the

difference of opinion between the Chief Counsel and the two agencies; but I know we all agree that all agencies should comply with the spirit and purpose of the Reg Flex Act. As I have noted, this Administration has taken several steps in that direction and I join my colleague Jere Glover in observing that, while much remains to be done, compliance with Reg Flex has been improving and, as a direct result, agencies are promulgating better regulations. Under the President's guidance and the collaborative direction of Sally Katzen and Jere Glover, agencies are becoming increasing responsive to the concerns of small business.

I thank you for giving me the opportunity to speak with you on this subject and I and my colleagues would be happy to try to answer any questions you may have.

Statement of

Frank S. Swain

before the

House Committee on Small Business

regarding

The Regulatory Flexibility Act

February 10, 1995

Madam Chair and Members of the Committee:

Thank you very much for inviting me to testify regarding the Regulatory Flexibility Act. My familiarity with the Regulatory Flexibility Act dates from 1979 when, as legislative counsel to the NFIB, I began to work with interested Members of Congress to advocate enactment of the legislation. Then as SBA Chief Counsel for Advocacy from 1981 through 1989, I had the responsibility to utilize the Regulatory Flexibility Act to achieve lessened regulation of small business.

The Regulatory Flexibility Act stands, to this day, as the only significant generic regulatory reform statute enacted in the past twenty years. But it is time to review and improve the law, and remedy its obvious shortcomings. The momentum provided by the Contract for America is an appropriate vehicle for this revision. Because strengthening the Regulatory Flexibility Act will provide not only renewed hope, but more clear rights for America's small businesses to challenge unnecessary or overreaching regulatory decisions.

It is useful to recall that in 1980, regulatory reform was somewhat of a revolutionary concept. The nation was just

beginning to realize that the pendulum had swung too far toward big government. The FTC was busy chasing funeral directors and auto dealers. OSHA was issuing citations like parking tickets, but with more dire consequences. The EPA was exercising the many new authorities the Congress had given through new environmental laws. The IRS was chasing small business on independent contractor issues (some things don't change). Small business began to realize that it wasn't enough to fight each battle with each agency. The biggest problem was that the agencies were inflexible, and seemingly incapable of using any discretion in crafting different rules for smaller firms. Some agencies even argued that they had no legal authority to vary their regulations by firm size.

And so the first and foremost objective of the Regulatory Flexibility Act, which is in fact an amendment to the Administrative Procedures Act, is to inform agencies that unless specifically prohibited by another law, each agency was to tailor its regulations to the problems created by smaller firms, and adjust the remedies accordingly.

At the time President Carter signed this law, there were in fact other proposals still pending in Congress for "generic" regulatory reform. President Carter had established a regulatory review unit within the OMB, and the idea of cost benefit analysis for major regulations was beginning to be more accepted. But the Congress would not accept that the regulatory momentum should be slowed, and refused to enact broader reforms. Were it not for

the major momentum given Regulatory Flexibility by the 1980 White House Conference on Small Business, I doubt this law would have been passed to this day. Because after the election of President Reagan, the regulatory reform process became too politicized to allow serious legislative discussion. As we know, by the end of the Bush Administration, the OMB regulatory review mechanism, which was the direct descendant of President Carter's office, was threatened with defunding by the Congress. I am very pleased that this Congress has a different and more realistic attitude toward the need for regulatory reform.

In 1980, the Congress passed the Regulatory Flexibility Act knowing full well that it was not self enforcing. However, the Congress also declined the opportunity to give private parties any ability to judicially press agencies to comply with the Act. Instead, the Congress established the SBA Advocacy office as a sort of traffic cop of Regulatory Flexibility, empowering Advocacy to challenge agencies speeding too quickly toward unnecessary small business regulation. But, to continue the metaphor, the Office of Advocacy only had a book of warning tickets to give out to errant agencies. It could shake its institutional finger, invite public attention, and complain to Administration and Congressional officials. But neither Advocacy nor any other party had any legal authority to require that an agency follow the dictates of the Regulatory Flexibility Act, perform the necessary analyses, and tailor the resulting regulations to better fit the problems of smaller entities.

And so I strongly believe that the first and most important improvement the Congress can make in the Regulatory Flexibility Act is to provide that private parties may seek judicial review of an agency's non compliance with the Act. Businesses or small entities which are adversely affected by an agency's proposed rule should have the right to challenge that rule on the grounds that it is arbitrary, capricious, as demonstrated by the agency's failure to perform the proper analysis of small business impacts, or by an agency's incomplete consideration of regulatory alternatives for smaller firms. Agencies will doubtless complain that the prospect of such challenges is burdensome, forgetting that the burden indefinitely rests on smaller businesses after a rule is issued. Regulations are like any government program; once started they are almost impossible to change or end. Unless they are clearly thought out before issuance, the small business economy can suffer unnecessary and avoidable costs for years.

Secondly, agencies need to be told to look at "indirect" effects of their regulation. This is clearly not the law now. If an agency sets rules for public entities in the environmental or utility field, it should be cognizant of any competitive disadvantages it might be creating for potential private competitors. The agency should not be able to put on blinders, and ignore the consequence of its regulations on those companies not directly subject to the regulation.

This is a particular problem in the context of potential privatization, or government agencies competing with private

business. For example, if the Department of Education is setting up its own direct student loan program, the impact of regulations whose effect is to remove the program from private lenders and guarantors should also be assessed. With the pressure on budgets and personnel ceilings, we can realistically expect that many agencies will come up with creative regulatory ways in which to advantage their own franchise or functions. If this type of regulation is promulgated, an agency should at least be able to admit that its rule disadvantages current or potential private competitors.

Third, the Office of Advocacy should continue its current regulatory monitoring role. But I am apprehensive about more formally inserting it in the process with advance notice of rules. The reason for my apprehension is that the Advocacy office effectively serves as the extension of the small business community. Advocacy's knowledge of regulatory impacts of proposals derives most immediately from its ability to consult with the small business community. If an agency sharing a proposal with SBA's Advocacy office before publication of the proposal would effectively deter Advocacy from consulting with the small business community on that proposal, then there is little advantage to such an arrangement.

Another concern I have on this point is that an agency should not be able to claim that a lack of specific response from the Office of Advocacy is tantamount to consent to the agency's efforts to comply with the Regulatory Flexibility Act. Federal

agencies propose hundreds of regulations each year. In my tenure at SBA, in our busiest years with our largest staff, we were able to submit formal written comments on about fifty regulatory proposals. It will never be possible for SBA to give in depth review to every new rule out of federal agencies. Advocacy necessarily picks and chooses those rules which it believes may have a great impact on small business. But the legislative record should be clear that SBA's not responding to a particular proposal should not be construed as approval of that proposal or acquiescence in the agency's regulatory flexibility efforts.

Finally, I urge the Congress to make a clear statement concerning the amicus authority of the Chief Counsel. I congratulate Mr. Glover for continuing to push the edge of the envelope on this issue. The fact is that the Congress apparently intends that an executive branch official will regularly challenge the decisions of other executive branch officials on regulations. This is not a problem at the rulemaking phase. But it does raise questions when two parties of the same executive branch are expected to square off in court against each other. If the Chief Counsel should be able to enforce his regulatory views at the judicial as well as the administrative phase of a rulemaking, the Congress should reiterate this point and directly address the putative objections. Of course, with new private enforcement rights, the Chief Counsel's role as a participant in the administrative phase will be more important, and agencies will be more on their toes to a judicial challenge directly from

small business.

I hope that this Committee will work with the Judiciary Committee and the Government Operations Committee on strengthening regulatory reform for small business, and especially the Regulatory Flexibility Act. I would be happy to respond to any questions.

Good morning, Madam Chair and Members of the Subcommittee. I am Christian S. White, Acting Director of the Bureau of Consumer Protection at the Federal Trade Commission ("FTC"). I am pleased to be here today on behalf of the Federal Trade Commission to present an historical assessment of the FTC's compliance with the Regulatory Flexibility Act ("RFA")[1] and to offer some views on Title VI of H.R. 9, the proposed Job Creation and Wage Enhancement Act of 1995. The views expressed in the prepared statement represent the views of the Federal Trade Commission. My responses to any questions you may have, however, are my own and do not necessarily reflect the views of the Commission or any individual Commissioner.

The RFA was designed to require agencies to reduce the regulatory burden on small business. It achieves this objective by requiring agencies to analyze the potential impact that proposed rules may have on small entities.

I. BACKGROUND

Congress has given the FTC the job of promoting the efficient functioning of the marketplace by protecting consumers from unfair or deceptive acts or practices and promoting vigorous competition.[2] The FTC's statutory mandate is broad and its

---

[1] 5 U.S.C. § 601 *et seq.*

[2] The Commission's testimony is focused almost exclusively on its consumer protection mission because the vast majority of the FTC's regulatory efforts are conducted by its Bureau of Consumer Protection.

responsibilities far-reaching. The Commission enforces the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[3] The Commission also has law enforcement responsibilities under some 30 additional statutes,[4] and enforces dozens of FTC trade regulation rules that set specific consumer protection disclosure requirements or standards for particular industries or practices.[5]

The basic goal of the Commission's consumer protection mission -- to maintain a well-functioning marketplace that allows consumers to make informed purchase choices -- has remained consistent over the years. However, the marketplace itself has

---

[3] 15 U.S.C. § 45(a).

[4] *E.g.*, the Clayton Act, 15 U.S.C. § 12, which prohibits various anticompetitive practices; the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401, which requires the FTC to regulate warning labels on smokeless tobacco products; the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, which mandates disclosures of credit terms; the Fair Credit Billing Act, 15 U.S.C. § 1666 *et seq.*, which provides for the correction of billing errors on credit accounts; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, which establishes rights with respect to consumer credit reports; and the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, which provides disclosure standards for consumer product warranties.

[5] *E.g.*, the Care Labeling Rule, 16 C.F.R. Part 423, which requires the provision of care instructions for wearing apparel; the Used Car Rule, 16 C.F.R. Part 455, which requires used car dealers to disclose warranty terms via a window sticker; the Franchise Rule, 16 C.F.R. Part 436, which requires the provision of information to prospective franchisees; the Mail Or Telephone Order Merchandise Rule, 16 C.F.R. Part 435, which gives consumers certain rights when ordering products through the mail and over the telephone; and the Funeral Rule, 16 C.F.R. Part 453, which regulates certain pricing and sales practices by funeral providers.

become increasingly complex. Consequently, the Commission has adopted some new enforcement strategies to better protect, and ensure the free flow of information to, consumers. The Commission's priorities with regard to consumer protection mirror the issues of greatest concern to consumers.[6] The Commission focuses its limited resources in areas evidencing the most significant consumer injury, with advertising; telemarketing, investment, and health care fraud; and deceptive practices involving use of new technologies being top priorities.[7] For example, the advent of interactive television evidences how technology is rapidly changing the way consumers learn about, buy, and pay for goods and services.

A. CASE-BY-CASE ENFORCEMENT EFFORTS

The Bureau of Consumer Protection's primary law enforcement strategy has been an aggressive case-by-case approach, emphasizing federal district court litigation under section 13(b) of the FTC Act, particularly in cases involving consumer fraud.

---

[6] Consumers are no longer concerned simply about price and quality; instead, they are increasingly concerned about the health implications of the food they buy, the environmental implications of packaging and other product attributes, the loss of their personal privacy, and the astounding growth of fraudulent practices in the telemarketing and other industries.

[7] Within these broad areas, the Commission has focused on: health claims in food advertising; environmental advertising and labeling; health care fraud; telemarketing, business opportunity, franchise and investment fraud; mortgage lending and discrimination; enforcement of Commission orders; and enforcement of credit statutes and a wide variety of trade regulation rules, including those listed in note 4, supra.

District court litigation allows us to proceed on an ex parte basis and obtain immediate preliminary relief which virtually always includes a temporary restraining order and a freeze of the defendants assets. By obtaining these extraordinary judicial remedies in proper cases, the FTC is able to achieve two critical objectives -- an immediate cessation of the alleged illegal practices and preservation of the defendants' assets for consumer redress or disgorgement to the U.S. Treasury, as appropriate. Utilizing this strategy, the Commission has successfully brought more than 200 cases under section 13(b); over 75% of those cases have been brought since 1990. We have obtained judgments of over $360 million; almost $100 million has been returned to consumers as redress.

The Commission also conducts administrative adjudications to pursue non-fraud cases involving novel or complex legal issues, often challenging apparently deceptive advertising claims in this manner. Litigated and negotiated administrative orders also have served as an important tool in developing Commission law in areas such as advertising substantiation.

B. REGULATORY EFFORTS

The Commission also uses rulemakings to comply with statutory mandates or where prescriptive standards can efficiently remedy widespread unfair or deceptive practices. The Commission has the authority, under Section 18 of the FTC Act, 15 U.S.C. § 57a, ("Section 18") to issue legislative "trade

regulation rules" with respect to unfair or deceptive acts or practices. However, since 1985, the vast majority of the new regulations issued by the Commission, or substantive amendments to existing regulations, have occurred in response to Congressional directives. The issuance of FTC trade regulation rules under the authority of the FTC Act has been far less frequent.

The Commission believes it has fulfilled its legislative mandates to issue rules and otherwise exercise its rulemaking authority in a timely and careful manner. The procedures for issuing rules under Section 18 are stringent and complex, providing for public input and participation in many forms.[8] In addition to complying with these procedures, the Commission has imposed on itself a stringent standard of analysis for proposed rules.

For example, in a number of its Section 18 rulemaking proceedings the Commission has determined that the record "should contain a preponderance of substantial reliable evidence in support of a proposed rule before that rule is promulgated."[9]

---

[8] In contrast, recent legislation requiring the Commission to issue rules usually has specified that the Commission use simple notice and comment procedures pursuant to the Administrative Procedure Act, 5 U.S.C. § 553, which permit the rulemakings to be completed in a much shorter time than would be possible under Section 18.

[9] Statement of Basis and Purpose (SBP) for the Mail or Telephone Order Merchandise Rule, 58 Fed. Reg. 49096, 49105 and notes 125-127 (Sept. 21, 1993). See also SBP for the Used Car Rule, 49 Fed. Reg. 45692, 45703 (Nov. 19, 1984); SBP for the Credit Practices Rule, 49 Fed. Reg. 7740, 7742 (March 1, 1984).

Thus, when substantial evidence both supported and contradicted a factual proposition underlying a determination that an existing act or practice was unfair or deceptive, the Commission has based its decisions on the preponderance of the evidence.[10] In contrast, a rule promulgated by the Commission may be challenged in court, and set aside, only if "the court finds that the Commission's action is not supported by substantial evidence in the rulemaking record...taken as a whole." 15 U.S.C. § 57a(e)(3)(A).[11] Before promulgating a rule the Commission also "believes that the public interest requires answers to the following additional questions: (1) Is the act or practice prevalent? (2) Does a significant harm exist? (3) Will the proposed rule reduce that harm? and (4) Will the benefits of the rule exceed its costs?"[12] In analyzing these questions, the Commission has concluded that "the best evidence often will be surveys or other methodologically sound quantitative studies. Carefully prepared studies can often give a reliable answer to each of the four questions".[13] The Commission, recognizes, however, that often "precise quantitative answers to these questions are not possible, or could be obtained only at prohibitive cost."[14]

---

[10] Id.

[11] Id.

[12] Id.

[13] Cited in SBP for the Used Car Rule, note 9, supra.

[14] Id.

When promulgating a rule under Section 18, the Commission is required by the statute to issue a statement of basis and purpose including "(A) a statement as to the prevalence of the acts or practices treated by the rule; (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers." 15 U.S.C. § 57a(d)(1).

In addition to legislative rules, the Commission issues industry guides. Guides are administrative interpretations of the FTC Act designed to provide the public with the Commission's views about which acts or practices are likely to violate the law.[15] For example, in 1992, the Commission issued Guides for the Use of Environmental Marketing Claims.[16] These guides were issued in response to a growing consumer interest in the environmental attributes of consumer products, as well as increased advertising of "green" claims. There was considerable industry support for these guides.

In 1992, the Commission initiated a program to review at least once every 10 years each of its rules and interpretive guides to evaluate their economic and other impact. Based on these reviews, the Commission determines whether to retain, repeal or amend the rule or guide under consideration. The Commissicn modeled these reviews on those included in the RFA,

---

[15] 16 C.F.R. §§ 1.5, 1.6.

[16] 16 C.F.R. Part 260.

which requires agencies to consider the impact of their regulations on small businesses during a 10-year period following the rule's promulgation.[17] Unlike the RFA review, however, the Commission's review is not limited to the impact of the regulation on small businesses; nor is it limited only to legislative rules. The Commission's program also applies to guides. Further, the Commission's program is designed to be recurring; that is, every rule or guide is to be reviewed at least once every 10 years.

This program institutionalized the Commission's prior practice of conducting periodic reviews on an ad hoc basis, and it is now incorporated in the Commission's Operating Manual. Further, the Commission has developed standardized questions to be included in the Federal Register notice seeking public comment in the review process.[18] In addition, variants of these questions are included in Federal Register notices seeking comment on new regulatory proposals, or proposals to amend existing rules or guides.

---

[17] 15 U.S.C. § 601 et seq.

[18] For example, the questions include ones such as: "Has this rule or guide had a significant economic impact (costs or benefits) on entities that are subject to its requirements," "What changes should be made to this rule or guide to minimize the economic effect on such entities," and "Is there a continuing need for this rule or guide." See, e.g., Review of the Rules under the Textile Act, 59 Fed. Reg. 23646 (May 6, 1994).

III. SUMMARY OF MAJOR REGULATORY ACTIONS SINCE 1985

In 1994, the Commission amended existing rules and regulations that were required by the Fair Packaging and Labeling Act ("FPLA") to comply with amendments to that Act requiring labels and packaging for many consumer products to be expressed in both the customary inch/pound measurement system and the metric system. In 1994 (as well as 1993, 1989, and 1987), the Commission amended the Appliance Labeling Rule, originally issued pursuant to the Energy Policy and Conservation Act of 1975, to include new product categories in compliance with directives in the National Appliance Energy Conservation Act of 1987 and the Energy Policy Act of 1992. In 1994, the Commission concluded a proceeding to amend the Appliance Labeling Rule that the Commission had initiated to make the rule more user-friendly. In 1994, the Commission also concluded a review of the Funeral Rule, issued by the Commission under Section 18 of the FTC Act, amending the Rule in response to comments received during the review process to improve its effectiveness for consumers and to delete what the Commission determined were unnecessary compliance burdens on funeral providers.

In 1993, as required by the Telephone Disclosure and Dispute Resolution Act of 1992, the Commission promulgated the 900-Number Rule governing the advertising, operation, and billing of pay-per-call telephone service. The Commission also amended the Octane Posting Rule, which was originally issued pursuant to the Petroleum Marketing Practices Act, to include alternative fuels

(e.g., methanol), as required by the Energy Policy Act of 1992. Further, in 1993 the Commission issued amendments to the Mail Order Rule, which became effective in March 1994, to cover sales via the telephone and related devices (e.g., fax machines and computers with modems). The amendments were viewed by direct marketers as a necessary change to keep pace with technological advancement in the industry. The Commission also deleted certain Rule provisions to make it easier for the industry to comply with the Rule.

In 1989, the Commission amended the Retail Food Store and Marketing Practices Rule to reduce the compliance costs associated with the Rule. In 1986, the Commission issued implementing regulations for the Comprehensive Smokeless Tobacco Health Education Act of 1986, as required by that Act.

During this period, as a result of ad hoc reviews of its rules, the Commission also repealed two rules in their entirety. Specifically, in 1990, the Commission found that due to changes in technology and marketing, the 1968 rule concerning deception as to the transistor count of radios was no longer in the public interest. Similarly, the Commission determined that its 1965 rule on "automatic" sewing machines no longer served a meaningful purpose. From time-to-time, the Commission also has issued nonsubstantive amendments to Rules, or granted conditional

exemptions to Rule provisions in order to reduce compliance burdens.[19]

Pursuant to the Commission's 10-year review program, initiated in 1992, the Commission has repealed one rule and four guides because they were obsolete or no longer needed by the industry.[20] Other rules and guides have been amended to reflect changes in consumer perception or to update them to include metric terminology.[21]

Currently, the Commission is engaged or soon will be engaged in two major rulemaking proceedings to comply with two Congressional mandates. The first of these is to issue by May 1995, as required by the Energy Policy Act of 1992, a rule requiring cost/benefit disclosure labels for alternative fuels

---

[19] For example, the Commission granted the requests of several companies for exemptions from the Octane Rule's format requirements for octane labels on fuel pumps, after determining that the proposed alternatives would not be less conspicuous than those prescribed by the Rule. See, e.g., Sun Oil Co., 55 Fed. Reg. 1871 (1990); Dresser Industries, Inc., 56 Fed. Reg. 26821 (1991); and Bennett Pump Co., 58 Fed. Reg. 64406 (1993).

[20] Specifically, the Commission repealed the Rule Concerning Discriminatory Practices in Men's and Boy's Tailored Clothing Industry, 59 Fed. Reg. 8527 (Feb. 23, 1994); Guides for the Greeting Card Industry Relating to Discriminatory Practices, 59 Fed. Reg. 8527 (Feb. 23, 1994); Guides for Advertising Fallout Shelters, 58 Fed. Reg. 68292 (Dec. 27, 1993); Guides for Advertising Radiation Monitoring Instruments, 58 Fed. Reg. 68292 (Dec. 27, 1993); and Guides for Advertising Shell Homes, 59 Fed. Reg. 49804 (Sept. 30, 1994).

[21] See, e.g., Guides for the Nursery Industry, 16 C.F.R. Part 18, 59 Fed. Reg. 64546 (Dec. 14, 1994) (amended to reflect changed consumer and environmental concerns over the labeling of "wild collected" plants); TV Picture Size Rule, 16 C.F.R. Part 410, 59 Fed. Reg. 54809 (Nov. 2, 1994) (amended to include metric examples).

and vehicles powered by alternative fuels. The second is to develop and issue by August 16, 1995, as required by the recently enacted Telemarketing and Consumer Fraud and Abuse Prevention Act, a rule defining and prohibiting deceptive telemarketing.

IV. COMPLIANCE WITH THE REGULATORY FLEXIBILITY ACT

The RFA requires agencies to take into consideration the impact on small businesses of their proposed rulemakings. The Act contains three main requirements.[22]

First, the RFA requires agencies to publish in the Federal Register a semiannual regulatory agenda summarizing rules that will be proposed or promulgated and that may "have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 602. To satisfy this requirement, the FTC publishes a semiannual regulatory agenda that describes and discusses any rules expected to be proposed or promulgated that are likely to have a significant impact on small businesses.

Second, the Act requires agencies to prepare initial and final regulatory flexibility analyses in the course of issuing new rules that may have a significant economic impact on a substantial number of small entities. 5 U.S.C. §§ 603-04. As

---

[22] The Commission is separately subject to very similar requirements under Section 22 of the FTC Act, 15 U.S.C. § 57b-3. The FTC Act requires preliminary and formal regulatory analyses with respect to its rules. 15 U.S.C. § 57b-3(b). The FTC Act also requires semiannual publication of a regulatory agenda and statement describing, inter alia, a proposed rule and its objectives, costs, benefits, and possible alternatives. 15 U.S.C. § 57b-3(d)(1). The Commission complies with this latter requirement by publishing its agenda in the Unified Agenda.

explained above, the cost-benefit analysis the FTC undertakes before promulgating rules reflects the Commission's concerns about the effect rules have on businesses generally and on small businesses in particular. If an impact is expected, an initial regulatory flexibility analysis describing that impact is prepared and published in the Federal Register. If not, the Commission certifies that the rule does not have a "significant economic impact on a substantial number of small entities" and that, therefore, an initial regulatory flexibility analysis is not required.

Even when the Commission determines that no significant impact on small entities will occur, however, the Commission requests public comment on that determination in its Notice of Proposed Rulemaking. Information submitted by the public may reveal a need for further analysis, even where the initial finding is negative.

In the recent amendments to the regulations under Section 4 of the Fair Packaging and Labeling Act, the Commission performed an initial regulatory flexibility analysis and received information that the amendments would be unlikely to have a significant economic impact on a substantial number of small firms. The Commission nonetheless published a final regulatory analysis to address and resolve any uncertainty on the question.[23]

---

[23] 59 Fed. Reg. 1870 (Jan. 12, 1994). In amending the rules under the FPLA, as required by the Congressional amendments to

(continued...)

Third, the Act requires periodic review of rules having a significant economic impact on a substantial number of small entities. The agency must describe, state the need and legal basis for, and invite public comment on each listed rule within ten years after the rule's promulgation. The Commission has regularly examined and amended the set of rules issued under its authority. The FTC recognizes that even well-written, well-justified rules can become outmoded or unnecessary. Thus, since 1980, the Commission has reviewed and modified or eliminated over 100 specific rule provisions, often in ways that produced benefits for small business and others as well. In sum, the Commission found that the reviews conducted under the Regulatory Flexibility Act were useful, and so it has built on the requirements of the Act and developed a comprehensive program to periodically review its industry guides as well as its rules.

---

[23](...continued)
the Act, the Commission also took other steps to minimize the cost to business. Specifically, although the effective date of the rules was February 14, 1994 (which was set by statute), the Commission determined to suspend enforcement of the rules until November 8, 1994 to allow businesses additional time to learn of and come into compliance with the rules. This action harmonized with the approach that the National Conference on Weights and Measures, which represents state enforcers of packaging laws, had determined to take. Id. at 1872.

V. TITLE VI OF H.R. 9

The Commission offers the following observations on Title VI of H.R. 9.[24] First, this Title would require agencies to consider the indirect as well as the direct effects of proposed rules, but the bill does not define "indirect" effects. Including "indirect" effects could dramatically broaden the scope of the analysis already required by the Regulatory Flexibility Act. To the extent that analysis of such effects becomes subject to judicial review, the potential exists for litigating issues that may concern only the marginal effects of rules.

The Commission consistently has been sensitive to minimizing compliance costs associated with its rules, wherever possible. The Commission's experience in seeking comment on the effect of its proposed rules is that generally few, if any, empirical data are submitted by affected business interests. Thoroughly assessing the direct effects of rules is a complex task. Requiring agencies to try to assess indirect costs is likely to be even more costly and may not produce offsetting benefits.

Second, Title VI would subject the RFA determinations to judicial review so businesses can challenge regulations that have a substantial impact on a significant number of small businesses. Should Congress determine that RFA determinations should be reviewable by the courts, the Commission recommends that such

---

[24] The Commission notes that other portions of H.R. 9 would also have a significant impact on its law enforcement efforts. Although the focus of this testimony in on Title VI of H.R. 9, the Commission would be pleased to provide further information about the impact of other portions of H.R. 9, if requested.

review be constrained by general principles of administrative law that enhance the efficiency with which the courts can entertain appeals, such as standing requirements and limitations of judicial review to final agency actions.

Third, Title VI would require each agency to notify the Chief Counsel for Advocacy of the Small Business Administration (SBA) 30 days before publishing a notice of proposed rulemaking. As noted, the FTC frequently conducts its own research to assess a potential rule's impact on businesses before it publishes a notice of proposed rulemaking. Moreover, the agency has worked hard to develop a positive working relationship with the SBA's Chief Counsel. The Commission hopes that consultation with the Chief Counsel can be incorporated into the existing rulemaking time frames so that it need not further prolong the time required for the careful consideration of rules. This concern is particularly acute as to rules that clearly would have no significant effect on small businesses. In some cases, the 30-day requirement could make it more difficult to comply with a statutory deadline for publication of the final rule.

This concludes my remarks. I will be happy to respond to any questions you may have.

SMALL BUSINESS
LEGISLATIVE
COUNCIL

TO: Members Of Congress

FROM: Gary F. Petty, Chairman

RE: Regulatory Flexibility Act

On behalf of the Small Business Legislative Council (SBLC) we wish to express our support for pending legislation to enact amendments to the Regulatory Flexibility Act (RFA). We urge you to vote in favor of the bill.

As long-time supporters of the RFA, we know from first-hand experience that agencies have been able to ignore the law due to the lack of judicial review. At the time of the enactment of the original RFA, we thought it was a risk we could reluctantly accept in order for us to overcome the then formidable resistance of the bureaucracy to the entire law. Time has proven that the price was too much to pay.

The original concept of the original law is still sound. The goal is to have agencies undertake an analysis of proposed rules to determine whether they have an adverse impact on small business. If such a determination is made, then the agency must explore alternatives to mitigate the impact on small business.

Small business is at the regulatory breaking point. All too frequently, small business owners tell us, "I am not sure I can advise my son or daughter to join me in the business. It is not worth it, the hassles outweigh the joys. They just might be better off working for someone else." It is time to reverse that trend.

In fact, for several years, we have said Congress should apply the same standard when considering proposed legislation, that is, analyze the impact on small business, and consider alternatives. We are pleased that the House has passed the unfunded mandate reform bill. It goes a long way towards establishing such a discipline. We hope that both the RFA amendment bill and an unfunded mandate reform bill will soon be sent to the President for signature.

The SBLC is a permanent, independent coalition of nearly one hundred trade and professional associations that share a common commitment to the future of small business. Our members represent the interests of small businesses in such diverse economic sectors as manufacturing, retailing, distribution, professional and technical services, construction, transportation, tourism, and agriculture. Our policies are developed through a consensus among our membership. Individual associations may express their own views. For your information, a list of our members is enclosed.

Members of the Small Business Legislative Council

Air Conditioning Contractors of America
Alliance for Affordable Health Care
Alliance of Independent Store Owners and Professionals
American Animal Hospital Association
American Association of Nurserymen
American Bus Association
American Consulting Engineers Council
American Council of Independent Laboratories
American Gear Manufacturers Association
American Machine Tool Distributors Association
American Road & Transportation Builders Association
American Society of Travel Agents, Inc.
American Subcontractors Association
American Textile Machinery Association
American Trucking Associations, Inc.
American Warehouse Association
American Wholesale Marketers Association
AMT-The Association for Manufacturing Technology
Architectural Precast Association
Associated Builders & Contractors
Associated Equipment Distributors
Associated Landscape Contractors of America
Association of Small Business Development Centers
Automotive Service Association
Automotive Recyclers Association
Bowling Proprietors Association of America
Building Service Contractors Association International
Christian Booksellers Association
Cincinnati Sign Supplies/Lamb and Co.
Council of Fleet Specialists
Council of Growing Companies
Direct Selling Association
Electronics Representatives Association
Florists' Transworld Delivery Association
Health Industry Representatives Association
Helicopter Association International
Independent Bakers Association
Independent Bankers Association of America
Independent Medical Distributors Association
International Association of Refrigerated Warehouses
International Communications Industries Association
International Formalwear Association
International Television Association
Machinery Dealers National Association
Manufacturers Agents National Association
Manufacturers Representatives of America, Inc.
Mechanical Contractors Association of America, Inc.
National Association for the Self-Employed
National Association of Catalog Showroom Merchandisers
National Association of Home Builders
National Association of Investment Companies
National Association of Plumbing-Heating-Cooling Contractors
National Association of Private Enterprise
National Association of Realtors
National Association of Retail Druggists
National Association of RV Parks and Campgrounds
National Association of Small Business Investment Companies
National Association of the Remodeling Industry
National Association of Truck Stop Operators
National Chimney Sweep Guild
National Association of Catalog Showroom Merchandisers
National Electrical Contractors Association
National Electrical Manufacturers Representatives Association
National Food Brokers Association
National Independent Flag Dealers Association
National Knitwear Sportswear Association
National Lumber & Building Material Dealers Association
National Moving and Storage Association
National Ornamental & Miscellaneous Metals Association
National Paperbox Association
National Shoe Retailers Association
National Society of Public Accountants
National Tire Dealers & Retreaders Association
National Tooling and Machining Association
National Tour Association
National Venture Capital Association
National Wood Flooring Association
Opticians Association of America
Organization for the Protection and Advancement of Small Telephone Companies
Passenger Vessel Association
Petroleum Marketers Association of America
Power Transmission Representatives Association
Printing Industries of America, Inc.
Professional Lawn Care Association of America
Promotional Products Association International
Retail Bakers of America
Small Business Council of America, Inc.
Small Business Exporters Association
SMC/Pennsylvania Small Business
Society of American Florists
Turfgrass Producers International

ISBN 0-16-047212-1